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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 78

A. C. FROST & COMPANY, PETITIONER

vs.

COEUR D'ALENE MINES CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR CERTIORARI FILED MAY 15, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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IN DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Reporter's Transcript

Case No. 9086

A. C. FROST & COMPANY, a Corporation, Plaintiff,

vs.

COEUR D'ALENE MINES CORPORATION, a Corporation, Defendant

Statement of Evidence—Lodged December 31, 1938

Before The Hon. Bert A. Reed, District Judge (Sitting without a jury)

APPEARANCES:

For the Plaintiff, H. J. Hull, Attorney at law, Wallace, Idaho. C. H. Potts, Attorney at law, Coeur d'Alene, Idaho.

For the Defendant, James A. Wayne, attorney at law, Wallace, Idaho.

Be it Remembered that on this 8th day of February, 1938, at the hour of 1:30 P. M., the above entitled matter came regularly on for hearing before the Honorable Bert A. Reed, one of the judges of the Eighth Judicial District, at Coeur d'Alene, Idaho; the Plaintiff corporation was represented by their agents and by the respective counsel as shown above, the Defendant corporation appearing by their counsel as shown above, whereupon witnesses were duly sworn, documentary evidence offered and proceedings had as follows, to-wit:

[fol. 8] COLLOQUY

The Court: Before we start in I want the record to show that the Court is a stockholder in this defendant company. That has been made known to both parties some time ago. I have no great desire to try the case but counsel for

plaintiff intimated to the court, as I remember, they wanted me to try the case, is that correct?

Mr. Potts: That is entirely correct. We said that ownership of a small amount of stock did not make any difference.

The Court: I want it shown in the record my position is known to both parties.

Mr. Potts: Well it was disclosed in the former proceeding.

Mr. Wayne: Of course the defendant has knowledge of that from their stock records.

Mr. Potts: Plaintiff has knowledge and makes no objection on that question.

The Court: I wish the record to show that because if this case goes to a higher court I want it to understand the situation.

Mr. Potts: We are of the opinion that it will be of some assistance to the court in the trial of this case if the plaintiff should make a rather full statement of the issues and a general line of the evidence offered to support our contention, because the issues are somewhat involved and there will be offers of lines of evidence — will be documentary which might not appear *re* relevant on the face and we want a very clear understanding of the issues.

D. E. Watson, called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Cross-examination (under the statute):

Mr. Potts: We are calling Mr. Watson, secretary of the [fol. 9] corporation for cross-examination.

Q. You may state your, name, residence and occupation?

A. My name is D. E. Watson; my residence, Wallace, Idaho and I am Secretary and Treasurer of the Coeur d'Alene Mines Corporation.

Q. How long have you held the office of secretary and treasurer of the defendant corporation?

A. I was elected secretary of the corporation on May 10th or 11th, 1936 and secretary and treasurer at the following annual meeting the following January.

Q. What month in 1936?

A. In May.

Q. In May 1936 you were elected secretary?

A. Yes.

Q. Who preceded you—who did you succeed as secretary?
A. F. E. Coffeen.
Q. That is a lady is it not?
A. It is.
Q. Miss F. E. Coffeen?
A. It is.
Q. When was Miss Coffeen secretary. Will you turn to your minutes to refresh your mind.

(Witness turns to book.)

A. January 12th, 1929.
Q. Did she continue to hold that office from January 12, 1929 until you succeeded her in May, 1936?
A. To the best of my knowledge.
Q. That is what the record shows?
A. That is what the record shows.
Q. The minutes show that don't they?
[fol. 10] A. Yes.
Q. When was R. W. Nuzem—you know, do you not, that R. W. Nuzum was President of this corporation for a period of years?
A. I do.
Q. In what period was he president of the defendant corporation?
A. He was elected president October 2, 1933.
Q. When was his successor elected?
A. His successor was elected in either May 10th *of* 11th, 1936.
Q. Was Mr. Nuzum president of the defendant corporation during that period between those dates?
A. That is what the record shows.
Q. Where did R. W. Nuzem live during that time?
A. He lived in Spokane.
Q. Where did F. E. Coffeen live?
A. She lived in Spokane.
Q. Will you turn to the minutes of October meeting of 19— minutes of the meeting which I believe was the organization meeting October 29th, 1929—1928. Do you find there the resolution establishing a branch office in Spokane, Washington?

(Witness looks at minutes.)

A. Yes there is such a resolution.

Q. This book that I hold in my hand or which you have produced. Is that—that is the minute book of the defendant corporation, is it not, Mr. Watson?

A. It is.

Q. It is in your custody as secretary of the corporation?

A. Yes.

Q. It is the record of stockholders and directors meeting?

[fol. 11] A. It is.

Q. And to the best of your knowledge it is the official record?

A. Yes.

Q. Of those meetings, is it not?

A. Yes.

Q. I will ask you to look at that paper I am handing you, which I will have marked—yes I probably should have marked it first—before I question the witness.

Resolution marked as Plaintiff's Exhibit No. 1, for identification.

Mr. Potts:

Q. And state whether or not that is an exact copy of this resolution which you have directed my attention with reference to the establishment of a branch office in Spokane?

A. It is an exact copy.

Q. It is?

A. Yes, it is.

Mr. Potts: I offer in evidence, Plaintiff's Exhibit No. 1 as a copy of the resolution in order to avoid offering the book.

Mr. Wayne: We don't object on that ground but defendant does object on the ground that the exhibit and the fact tended to be proven by it are immaterial so far as any issue in this case is concerned. That the authorization of the defendant corporation to maintain a branch office outside the state of Idaho is questioned and is not an issue in this case. For that reason it is immaterial.

The Court: Objection overruled. It will be admitted. I might add at this time, if the other side expects to introduce this book in evidence.

Mr. Wayne: We have not thought of doing so.

[fol. 12] Plaintiff's Exhibit No. 1, admitted in evidence.

Mr. Potts: We expect to introduce in evidence these minutes.

The Court: I mean the book itself.

Mr. Potts: No. I don't think so. I don't see any necessity of encumbering the record with the book. That is the reason I had that introduced here instead of having it identified.

The Court: I simply asked because I would not think it would be necessary to encumber the record if the book itself would be introduced.

Mr. Potts:

Q. Mr. Watson, would you please turn to the record of the special meeting of the board of directors of the defendant corporation held at the office of the company at 605 Columbia Building, Spokane, Washington, on the 22nd day of September, 1934. (The witness does so.) I am going to have this page marked and offer it in evidence with the request for permission to substitute a copy.

The Court: Any objections?

Mr. Wayne: Are you offering the entire minutes of that meeting?

Mr. Potts: Yes, the entire minutes. It is less than one page.

Minutes of the meeting of September 22, 1934, marked as Plaintiff's Exhibit No. 2, for identification.

Mr. Potts: We offer in evidence Plaintiff's Exhibit No. 2.

Mr. Wayne: We have no objections.

The Court: It will be admitted.

Plaintiff's Exhibit No. 2, admitted in evidence.

Mr. Potts:

Q. Mr. Watson, will you turn to the minutes of the special [fol. 13] meeting of the *meeting of* board of directors of August the 3rd, 1935?

A. August the 3rd, 1935, did you say?

Q. Yes.

A. I have those minutes.

Mr. Potts: May I see them. (Hands to Mr. Potts.)

Copy of minutes of meeting of August 3rd, 1935, marked as Plaintiff's Exhibit No. 3 for identification.

Mr. Potts: The Plaintiff offers in evidence Plaintiff's Exhibit No. 3, being a record of the minutes of a meeting of August 3rd, 1935. Counsel hands to Mr. Wayne.

Mr. Wayne: Objected to as immaterial and irrelevant.

The Court: Objection overruled.

Mr. Wayne: I assume we will have an exception to it—to each adverse ruling without stating it.

The Court: Well, the law gives you that. The exhibit will be admitted in evidence.

Plaintiff's Exhibit No. 3 admitted in evidence.

Mr. Potts:

Q. Mr. Watson, I understand also—I understand you were connected with the defendant corporation prior to your election as Secretary, is that true?

A. That is correct.

Q. For about how long?

A. I started to work for the corporation June 1st, 1935, as bookkeeper.

Q. Where?

A. Both in Spokane and Wallace.

Q. That is June 1st, 1935?

[fol. 14] A. That is correct.

Q. Prior to that you had no connection with the company whatever?

A. None whatever.

Q. Did you know anything about its operations or business before that?

A. Only what I have found out by what people have told me.

Q. You were not around where you saw anything about it yourself?

A. No.

Q. Well you do know, do you not, that prior to June 1st, 1935 the mining property of the defendant here in Shoshone County was merely a development project?

A. That is correct.

Q. It was not a producing mine?

A. It had been but was not then.

Q. It shipped no ore?

A. No, not at that time. Prior it had but not at that time.

Q. How long prior?

A. I couldn't tell you exactly.

Q. How many years?

A. About twenty, I believe.

Q. About twenty years?

A. Yes.

Q. And the only activity of this company in connection with that property was the carrying on developement work for several years?

A. That is correct.

Q. Prior to 1935?

[fol. 15] A. That is correct.

Q. The financing negotiation, correspondence, general business of the company was conducted by Mr. Nuzem and Miss Coffeen from the branch office in Spokane, was it not?

A. I could not answer that. I do not know.

Q. Do you know whether of not the company paid rental for that office in Spokane?

A. I think the minutes will show they started paying rent in 1935, I believe.

Q. In 1935?

A. Yes.

Mr. Potts: That is all.

Redirect examination.

Mr. Wayne:

Q. Mr. Watson, this corporation never did own any property in Spokane, did it?

A. Never did.

Q. Where was this property—mining property situated?

A. Shoshone County.

Q. And consisted at the time of you went to work for them of what?

A. It consisted of Mineral Point Groupe, the Lonesome Pine Groupe and certain fractions we located ourselves or rather the manager located and added to the company.

Q. As to the Mineral Point property the defendant corporation had only an option on that?

A. That is correct.

Q. And at the time that you have testified about it paid nothing on that option?

A. Nothing at all.

Q. Have you got the articles of incorporation of the com-
[fol. 16] pany here?

A. I think you will find them in the first part of the book.

Mr. Wayne: I think that is all.

Recross examination under the statute.

Mr. Potts:

Q. At what time were you testifying about when you said the company had paid nothing on the option for the Mineral Point property?

A. I thought we were testifying as to the year 1935.

Q. When you first became connected with the company.

A. That is correct.

Mr. Potts: That is all. The witness is excused.

Mr. Potts: I want to have the stipulation of facts entered into between the parties and filed in the cause, identified and received in evidence pursuant to its provisions.

Stipulation marked as Plaintiff Exhibit No. 4, for identification.

Mr. Potts: The plaintiff offers in evidence Plaintiff's Exhibit No. 4, being the Stipulation of facts entered into between the parties and filed in the cause on February 8, 1938 at 1:32 o'clock P. M.

Mr. Wayne: No objections.

The Court: It will be admitted.

Plaintiff's Exhibit No. 4 admitted in evidence.

Mr. Potts: Now I expect this would be a good time for a short recess.

The Court: We will take a short recess. (Thereafter the matter was again taken up.)

A. C. Frost, called as a witness in his own behalf and
[fol. 17] being first duly sworn, testified as follows:

Direct examination.

Mr. Potts:

Q. State your name, residence, and business, Mr. Frost?

A. A. C. Frost, reside in Seattle, financial business.

Q. Mr. Frost, are you somewhat hard of hearing?
A. Yes.
Q. Which is the best side to address you—the right I suppose?
A. Beg pardon?
Q. Where do you hear best? Right hand side?
A. The left is impa-red. The left side is impaired.
Q. What is your age, Mr. Frost?
A. Seventy-two.
Q. Are you acquainted with the plaintiff, A. C. Frost & Company?
A. Yes.
Q. How long have you been connected with the plaintiff corporation?
A. Since its incorporation in 1924.
Q. And what has been your connection with it?
A. President and Manager.
Q. As such President and Manager, what part have you had in the handling of its business affairs?
A. Entirely.
Q. You have handled them?
A. Yes.
Q. Did you take any action, Mr. Frost, after the enactment of Chapter 70 of the Laws of 1937 of the State of [fol. 18] Washington toward having the plaintiff corporation in the State of Washington?
A. Yes.
Q. What did you do?

Mr. Wayne: We object that that as immaterial. It is covered already by the stipulation.
The Court: I don't see any materiality of that.
Mr. Potts: I want to show the payment of the license fees.
The Court: That is stipulated.
Mr. Potts: I was leading up to a subsequent matter.

Q. After the reinstatement of A. C. Frost & Company, in March, 1937, and the payment of the license fee for that year, did you subsequently pay the license fee and the security license for the following year?
A. Yes.

Mr. Wayne: Objected to as immaterial.
The Court: He has already answered. It may stand.

Receipt for the corporation license, July 1, 1937, to June 30, 1938, marked as Plaintiff's Exhibit No. 5, for identification.

Mr. Potts:

Q. I hand you Plaintiff's Exhibit No. 5 and I will ask you if you know what that it?

A. That is a receipt for the corporation license July 1, 1937 to June 30, 1938.

Q. For whom—what firm?

A. A. C. Frost & Company.

Q. You may state whether or not you have paid that?

A. The company paid that.

Q. Did you secure that license—it was from whom?

[fol. 19] A. From the Secretary of State.

Mr. Potts: We offer in evidence Plaintiff's Exhibit No. 5.

Mr. Wayne: Objected to as immaterial and irrelevant.

The Court: Overruled.

Plaintiff's Exhibit No. 5 admitted in evidence.

Mr. Potts: I ask permission to substitute a copy which is prepared.

The Court: Any objections to the copy?

Mr. Wayne: No.

Mr. Potts:

Q. Mr. Frost, where has the plaintiff company conducted its business during the past several years?

A. Seattle.

Q. Seattle, Washington?

A. Yes.

Q. Has it transacted any business in the State of Idaho?

A. No.

Q. In the early fall of the year 1934 did you have anything to do with negotiating this option agreement of September 10, 1934 that is involved in this case?

A. Yes.

Q. Where were you at the time?

A. Well sir, I was in the East, Chicago, New York and Toronto.

Q. Do you know W. J. Boland, party of the second part named in that agreement at that time?

A. Yes.

Q. Where did he live?

A. Toronto, Ontario.

[fol. 20] Q. And did you have any conversation with him in connection with these negotiations?

A. Yes.

Q. And as a result of those negotiations, did you make any arrangement for obtaining the assignment of that contract?

A. Yes.

Q. What did you do with reference to providing funds of the cash consideration of Fifty-five Hundred Dollars and subsequent payment?

A. Arranged with C. D. Schede to make the payments.

Q. For whom?

A. For A. C. Frost & Company.

Q. How was the payment of the cash consideration mentioned in the agreement made? Do you know—in what manner?

A. The first five payments were telegraphed by Mr. Schede from Chicago to Spokane Eastern Trust Company of Spokane to the credit of Coeur d'Alene Mines Corporation.

Q. Have you with you, Mr. Frost, the minute book of A. C. Frost and Company?

A. Yes.

Q. Is this book I hand you, the minute book of plaintiff?

A. Yes.

Q. And where is that usually kept?

A. In the office of A. C. Frost & Company in the Henry Building, Seattle, Washington.

Q. Will you turn to the minutes of a meeting of the Board of Trustees of A. C. Frost & Company held on January 2, 1929?

A. It is an exhibit in the Seattle case I believe.

Q. This page is the one I refer to.

[fol. 21] A. January 2nd.

Q. January 2, 1929?

A. Yes.

Q. Does that page in the minute book record precede the meeting of the board of trustees?

A. They do.

Page from the Minute Book of A. C. Frost and Company minutes of the meeting of January 2, 1929, marked as Plaintiff's Exhibit No. 6, for identification.

Mr. Potts: I offer in evidence Plaintiff's Exhibit No. 6 for the purpose of proving the election of A. C. Frost as President of A. C. Frost & Company.

Mr. Wayne: May I take time to look at this a moment.

The Court: Yes.

Mr. Wayne: Objected to as immaterial.

The Court: What is the materiality of it, Mr. Potts?

Mr. Potts: Pardon.

The Court: What is the materiality of it?

Mr. Potts: To prove the election of Mr. Frost as president of A. C. Frost & Company. And they are confined to the subsequent dealings with this corporation under the contract.

The Court: What has that to do with this year?

Mr. Potts: I propose to show this election.

The Court: 1929? Objection overruled.

Plaintiff's Exhibit No. 6 admitted in evidence.

Mr. Potts: Now I ask permission to substitute a copy for Plaintiff's Exhibit No. 6 and withdraw the original.

The Court: It may be permitted.

Mr. Potts:

[fol. 22] Q. Mr. Frost, after this meeting of January 2, 1929—Plaintiff's Exhibit 6 showing the minutes—has there been any subsequent election of officers?

A. I believe not.

Q. Of the corporation?

A. No.

Q. Have you since the time—state whether or not since that time you have held the office of president of A. C. Frost & Company?

A. Yes.

Page and minute book, minutes of a meeting of December 18, 1933 of A. C. Frost & Company marked as Plaintiff's Exhibit No. 7, for identification.

Mr. Potts:

Q. I hand you page of minute book identified as Plaintiff's Exhibit No. 7, and I will ask you to state whether or not if that is the record of the meeting of the Board of Trustees of A. C. Frost & Company?

A. Yes.

Q. As of what date?
A. December 18, 1933.

Mr. Potts: We offer in evidence Plaintiff's Exhibit No. 7 (hands to Mr. Wayne) for the purpose of proving the adoption of a resolution showing in effect that the business conducted by A. C. Frost in his own name is conducted for the benefit and advantage and use of the corporation together with declaration of trust accompanying the minutes of that meeting.

Mr. Wayne: To which we object on the grounds it is th-roughly immaterial and also incompetent.

[fol. 23] The Court: It will be admitted.

Plaintiff's Exhibit No. 7 admitted in evidence.

Mr. Potts: And we ask to submit a copy for Exhibit No. 7.
The Court: It will be permitted.

Assignment of the option agreement with the Coeur d'Alene Mines Corporation from W. J. Boland to A. C. Frost & Company, marked as Plaintiff's Exhibit No. 8, for identification.

Contract under date of September 10, 1934, between the Coeur d'Alene Mines Corporation and W. J. Boland, marked as Plaintiff's Exhibit No. 9, for identification.

Mr. Potts:

Q. I hand you Plaintiff's Fxhibit No. 9 purporting to be a contract under date September 10, 1934 between Coeur d'Alene Mines Corporation and W. J. Boland and ask you to state if you ever saw that before?
A. Yes.
Q. Is that the contract involved in this action?
A. It is.
Q. And from whom—do you know the signature of R. W. Nuzum?
A. I do.
Q. And F. E. Coffeen?
A. I do.
Q. And W. J. Boland?
A. I do.

[fol. 24] Q. Are those signatures affixed to that instrument the signatures of those persons?
A. They are.

Q. From whom did you receive that contract, Mr. Frost?
A. W. J. Boland.
Q. About when?
A. The latter part of September.
Q. What year?
A. 1934.

Mr. Potts: We offer Plaintiff's Exhibit No. 9 (hands to Mr. Wayne).

Mr. Wayne: Defendant objects to Plaintiff's exhibit No. 9 as being incompetent, irrelevant and immaterial and for the further reason that it is now shown by the evidence that the date of this contract, the A. C. Frost Company, plaintiff, was not in a existence—having been dissolved as a corporation on July 1, 1934. And that if, then, the purpose of the offer is to show a contract to which and in which the Plaintiff had no part, it is incompetent evidence and irrelevant.

The Court: I will take your objection under advisement. It will be admitted.

Plaintiff's Exhibit No. 9 admitted in evidence.

Mr. Potts: I ask leave to withdraw the original exhibit No. 9 and substitute a copy.

The Court: The contract that is the basis of the suit?

Mr. Potts: Yes.

The Court: Why.

Mr. Potts: On general principles. I will withdraw that request. We will leave that contract in.

[fol. 25] Mr. Potts:

Q. I hand you plaintiff's exhibit 8, Mr. Frost, and ask you to state what it is if you know?

A. It is an assignment of the option agreement with Coeur d'Alene Mines Corporation from W. J. Boland to A. C. Frost & Company.

Q. You may state whether or not that instrument was delivered to you at the same time?

A. The same time the option agreement the latter part of September, 1934.

Q. Have you had it since that time?

A. We have, yes.

Mr. Potts: Plaintiff offeres in Evidence Plaintiff's Exhibit No. 8 (hands to Mr. Wayne).

Mr. Wayne: Defendant objects to the introduction of Exhibit 8 on each and every of the grounds that we did object to on No. 9. The exhibit is really out of order. Further that it is not in proof of any allegation of a complaint, being a different assignment than that sets up as an exhibit to the complaint. Exhibit "B" bearing a different date. For the further reason it is not part of the assignment of the contract exhibit 9 for the reason that it bears a date prior to the date of the execution of the contract. In other words it predates it by two days.

The Court: It will be admitted subject to your objection as stated before to Exhibit 9.

Plaintiff's Exhibit No. 8 admitted subject to Mr. Wayne's objection.

Mr. Potts:

Q. As to the date of Exhibit 8, Mr. Frost, what is the [fol. 26] fact as to whether or not these negotiations covered the same period of time?

A. Covered some three weeks. There was several option agreements submitted which were not acceptable and returned.

Q. When it finally came to the close of it are those the instruments that you received?

A. Those are the final instruments we received, yes.

Q. And did you afterwards submit a copy of that assignment to the Defendant corporation?

A. Yes.

Mr. Potts: (to Mr. Wayne) Will you gentlemen let me have the letter of December 12, 1934.

Letter Bearing Date of December 12, 1934 marked as Plaintiff's Exhibit No. 10 for identification.

Mr. Potts:

Q. Calling your attention to a letter pinned in the minute book of Defendanr corporation, bearing date of December 12, 1934, you may state whether or not you wrote that letter?

A. I did.

Q. And did you send it to any one?

A. I did.

Q. To whom?

A. R. W. Nuzum, President of the Coeur d'Alene Mines Corporation, 605 Columbia Building, Spokane, Washington.

Q. And did you send the paper that is referred to in the-re copy of this assignment?

A. I did.

Q. Is that a copy of the assignment which is attached to that letter?

[fol. 27] (Witness looks at record.)

Mr. Potts: Well perhaps you can tell——

A. That is the assignment.

Mr. Potts: We offer in evidence Plaintiff's Exhibit No. 10 (hands to Mr. Wayne).

Mr. Wayne: To which the defendant objects, if your Honor please, upon the grounds that it is incompetent, irrelevant and immaterial. And may I make now, this general objection to any evidence, oral or written, showing any act or attempting to show any act or action by A. C. Frost & Company, subsequent to its dissolution on July 1, 1934.

The Court: It will be admitted subject to his objection.

Plaintiff's Exhibit No. 10 admitted subject to the objection.

Mr. Potts: We ask leave to withdraw that original exhibit and substitute a copy.

The Court: It will be admitted.

Mr. Potts:

Q. Prior to sending that letter December 12, 1934, to the defendant corporation, had you contacted Mr. Nuzum, the president of the company, with reference to this contract?

A. Yes.

Q. About when?

A. In November, 1934.

Q. And where?

A. In Spokane.

Q. What place?

A. The Davenport Hotel.

Q. Was there anything said at that time with reference to your having obtained an assignment of the contract?

[fol. 28] A. I informed Mr. Nuzum fully of the assignment.

Q. And from that time on what did you do with reference to conducting business relations with the defendant through Mr. Nuzum and Miss Coffeen, the secretary?

A. I—he knew of that option—of that agreement on September 10, 1935.

Q. Did you have business dealings with the defendant and its officers from that time on with reference to that agreement or under that agreement?

A. Yes (the question repeated).

Q. Were they large in extent or small, Mr. Frost?

Mr. Wayne: I think those questions are all leading.

The Court: I agree.

Mr. Potts:

Q. The nature of your dealings and the amount of them. Did you see them often—did you correspond with them?

A. Very frequently—almost daily.

Q. Did you make any trips from Seattle to Spokane, to confer with Mr. Nuzum regarding this contract?

Mr. Wayne: Object to that as leading.

The Court: He may answer.

Mr. Potts: Did you answer?

A. About twenty-one trips, special trips.

Q. In what period of time?

A. From the middle of November until the Fall of November, 1934 until the Fall of 1935.

Q. Did you conduct the negotiations with the defendant looking toward a modification of the terms of payment of that contract?

Mr. Wayne: Object to all that questioning on the ground that it is leading. Object to this only on that ground.

[fol. 29] Mr. Potts: And we contend they are not leading.

The Court: Well, he may answer (the last question read to the witness).

Witness Answering: Yes.

Mr. Potts:

Q. About when was that—in what month?

A. I think in April—either April or May 1934.

Q. Well in the year following the date of the contract wasn't it Mr. Frost?

A. 1935.

Q. I will call your attention to correspondence——

Letter from R. W. Nuzum Dated April 12, 1935, marked as Plaintiff's Exhibit No. 11 for identification.

Mr. Potts:

Q. Make an examination of Plaintiff's Exhibit No. 11 and state generally what that is without stating its contents.

A. It is a letter from R. W. Nuzum, president of the Coeur d'Alene Mines Corporation, directed to me, dated April 12, 1935.

Q. Did you receive that letter?

A. I did.

Mr. Potts: We offer in evidence Plaintiff's Exhibit No. 11 (hands to Mr. Wayne).

Mr. Wayne: No objection to that.

The Court: It will be admitted.

Plaintiff's Exhibit No. 11 admitted in evidence.

Mr. Potts: Will you gentlemen give me a letter—(Mr. Wayne then hands a letter to Mr. Potts).

[fol. 30] Letter Addressed to Mr. R. W. Nuzum Dated April 12, 1935, marked as Plaintiff's Exhibit No. 12 for identification.

Mr. Potts:

Q. I hand you Plaintiff's Exhibit No. 12, Mr. Frost. You may state what that is, if you know?

A. It is a letter—my letter addressed to Mr. R. W. Nuzum, President of Coeur d'Alene Mines Corporation, dated April 12, 1935.

Mr. Potts: We offer Plaintiff's Exhibit No. 12 in evidence (hands to Mr. Wayne).

Mr. Wayne: No objection to 12.

The Court: It will be admitted.

Plaintiff's Exhibit No. 12 admitted in evidence.

Mr. Potts: Mr. Wayne do you care about these originals being returned?

Mr. Wayne: No, we would like to have them temporarily.

Mr. Potts: Well there is no time like the present then. We ask leave to withdraw the original Exhibit No. 12 and substitute a copy.

The Court: Is there any objection? I presume there is no objection.

Letter from F. E. Coffeeen Addressed to A. C. Frost, Dated April 26, 1935 marked Plaintiff's Exhibit No. 13 for identification.

Q. Plaintiff's Exhibit No. 13, Mr. Frost, you may state what that is.

A. A letter from F. E. Coffeen, secretary of Coeur d'Alene Mines Corporation, addressed to A. C. Frost and [fol. 31] A. C. Frost & Company dated April 26, 1935.

Q. What relation, if any, has that letter to the letter of April 25, 1935?

A. This extends of the final——

Q. I will ask whether or not it is an answer to it?

A. Yes sir.

Mr. Wayne: It shows for its self.

Mr. Potts: We offer in evidence Plaintiff's Exhibit No. 13 (hands to Mr. Wayne).

Mr. Wayne: No objection to 13.

The Court: It will be admitted.

Plaintiff's Exhibit No. 13 admitted in evidence.

Mr. Potts:

Q. Mr. Frost, in Plaintiff's Exhibit No. 13, reference is made to a draft for One Thousand Dollars received today. In your letter of April 25,—the day before, the statement is made "you are authorized to use the inclosed Bank Draft for One Thousand Dollars in payment of the first installment for which please send us certificate for 10,000 shares." You may state whether or not the bank draft referred to in Plaintiff's Exhibit 13 is or is not the bank draft which you inclosed with your letter of April 25, 1935, being Plaintiff's Exhibit No. 12?

A. It is the same.

Q. What is the fact as to whether or not that draft was used by them?

A. It was mailed—that check or draft—the bank draft I did not get the returns on that draft. It was cashed and I took it for granted it was used.

Q. Well, reference is made to Plaintiff's exhibit 13 to [fol. 32] certificate No. 690 for 10,000 shares of stock?

A. I received the stock.

Mr. Potts: May I have the letter of May 11, 1935.

Letter Under Date of May 11, 1935 from A. C. Frost & Company Addressed to Coeur d'Alene Mines Corporation, marked as Plaintiff's Exhibit No. 14 for identification.

Mr. Potts:

Q. I hand you Plaintiff's Exhibit 14, a letter under date of May 11, 1935 and I will ask you to state, if you know, what that is?

A. It is a letter of A. C. Frost & Company by me as president of the company, addressed to Coeur d'Alene Mines Corporation, 605 Columbia Building, Spokane, Washington, dated May 11, 1935.

Q. Was that letter sent by mail or delivered in person?

A. It was drafted and signed in Mr. Nuzum's office, 605 Columbia Building.

Q. You signed it there?

A. I did.

Q. And what was done with it after you signed it?

A. Handed it to Mr. Nuzum.

Mr. Potts: We offer Plaintiff's Exhibit 14.

Mr. Wayne: Only the general objections to it.

The Court: It will be admitted.

Plaintiff's Exhibit No. 14 admitted in evidence.

Mr. Potts: And that letter is pasted in the minute book, so I will ask to withdraw the exhibit and introduce a copy [fol. 33] or substitute a copy.

The Court: Any objections?

Two Papers from F. E. Coffeen, Secretary of Coeur d'Alene Mines Corporation marked as Plaintiff's Exhibit No. 15 for identification.

Mr. Potts:

Q. You may state whether or not you received Plaintiff's Exhibit No. 15 in due course of mail?

A. I did.

Q. From whom?

A. F. E. Coffeen, secretary of Coeur d'Alene Mines Corporation.

Q. And the paper attached to it, what is the fact as to whether or not it conveyed the letter?

A. That conveyed the letter, yes.

Mr. Potts: We offer in evidence Plaintiff's Exhibit No. 15 including the paper attached, to it (hands to counsel).

Mr. Wayne: No objections to 15.

The Court: It will be admitted.

Plaintiff's Exhibit No. 15 admitted in evidence.

Mr. Potts:

Q. Mr. Frost, after receiving Plaintiff's Exhibit 15, a letter bearing date May 15, 1935 with the certificed copy of the resolution conveying, what if, anything, did A. C. Frost and Company do in connection with the transaction represented by this letter the certificed copy of the resolution?

A. We acted upon the resolution.

Q. Did you hold a meeting of your Board of Directors?

[fol. 34] A. Yes.

Q. Had you been requested by anybody to do that?

A. Did I what? (the question read by the Reporter).

A. Mr. Nuzum asked for our resolution.

Page in minute book of A. C. Frost & Company marked as Plaintiff's Exhibit No. 16, for identification.

Mr. Potts:

Q. Referring to page in the minute book of A. C. Frost & Company, identified as Plaintiff's Exhibit No. 16, you may state what that it? (hands to witness).

A. The minutes of special meeting of Board of Directors of A. C. Frost & Company held on the 20th of May, 1935.

Q. Is that the record of the meeting that was held in connection with this transaction which was requested by Mr. Nuzum?

Mr. Potts: We offer Plaintiff's Exhibit 16 in evidence.

Mr. Wayne: To which we object that it is incompetent irrelevant and immaterial. The evidence already showing that A. C. Frost & Company had been dissolved as a corporation on July 1, 1934. Entirely and a year before this

pretended meeting was held. Could not function as a corporation.

Mr. Potts: Of course we are going to argue that question.

The Court: It will be admitted subject to the objection.

Plaintiff's Exhibit No. 16 admitted subject to objection.

Mr. Potts: (to Mr. Wayne) A letter of May 29, 1935, from Frost & Company to Nuzum inclosing certified copy.

Letter of A. C. Frost addressed to R. W. Nuzum May 29, [fol. 35] 1935, inclosing certified copy of resolution, etc. marked as Plaintiff's Exhibit No. 17.

Mr. Potts:

Q. Mr. Frost, I hand you Plaintiff's Exhibit 17 and ask you to state what that is?

A. A letter of A. C. Frost addressed to R. W. Nuzum, 605 Columbia Building, Spokane, Washington, dated May 29, 1935, inclosing certified copy of resolution passed by A. C. Frost & Company on the 20th day of May, 1935.

Q. Is that the resolution to which you testified a moment ago?

A. Yes, sir.

Q. And is that your signature to that letter?

A. Yes sir, it is.

Q. What is the fact as to whether it was transmitted to Mr. Nuzum?

A. It was mailed.

Mr. Potts: We offer exhibit 17.

Mr. Wayne: We make the same objections.

The Court: Same ruling.

Plaintiff's Exhibit No. 17, admitted.

Mr. Potts: We ask to withdraw Plaintiff's Exhibit 17 including the certified copy of the resolution and substitute certified copies.

The Court: Is that part of the minute book?

Mr. Potts: Not a part of the minute book, it is a certified copy of the minutes that has been introduced in evidence which was transmitted to the defendant.

The Court: Any objection.

Mr. Wayne: No objections.

[fol. 36] Letter to R. W. Nuzum, president of Coeur D'Alene Mines Corporation, dated December 10, 1934, marked as Plaintiff's Exhibit No. 18, for identification.

Mr. Potts:

Q. Mr. Frost, what is the exhibit marked Plaintiff's Exhibit 18 for identification?

A. My letter to R. W. Nuzum, President of the Coeur d'Alene Mines Corporation, 605 Columbia Building, Spokane, Washington, dated December 10, 1934.

A check of A. C. Frost & Company in favor of Coeur d'Alene Mines Corporation, dated December 10, for $2500.00, marked as Plaintiff's Exhibit No. 19, for identification.

Mr. Potts:

Q. And what is the instrument marked Plaintiff's Exhibit No. 19?

A. Check of A. C. Frost and Company in favor of Coeur d'Alene Mines Corporation, dated December 10, for $2500.00.

Q. For what was that?

A. Payment for 25,000 shares of Coeur d'Alene Mines Corporation stock.

Q. What stock?

A. Treasury stock—treasury shares.

Q. Under the option agreement?

A. Yes. Under the option agreement in evidence covered by the option agreement.

Mr. Potts: We offer in evidence Plaintiff's Exhibits 18 and 19 (hands to counsel).

[fol. 37] Mr. Wayne: And we make the same general objection to both of these, that we made before. Raising that question of the dis-olution of the corporation. And to both of these we make the further objection that they are immaterial. There isn't any controversy between the plaintiff and defendant as to certain payments of which this is one.

The Court: It will be admitted subject to the objection.

Plaintiff's Exhibits 18 and 19, admitted in evidence.

The Court: They have admitted payments were made on April 15.

Mr. Potts: No, the admission does not go that far. They made payments but their allegations or payment are not in harmony with their proof of payment but that is not the only purpose of this offer. The purpose of this offer is to

show payments of funds under this agreement to the defendant corporation for the plaintiff corporation in the deal as well as to cover the payments and also, as to this letter—well it speaks for itself. As to this letter, Plaintiff's Exhibit 18, I shall ask to withdraw the original and substitute a copy.

The Court: It will be admitted.

Letter from R. W. Nuzum addressed to A. C. Frost, dated December 11, 1934, marked Plaintiff's Exhibit No. 20, for identification.

Mr. Potts:

Q. What is Plaintiff's Exhibit No. 20, Mr. Frost?

A. R. W. Nuzum's letter addressed to A. C. Frost, dated December 11, 1934.

Q. Did you receive that letter?

A. I did.

[fol. 38] Q. Is that R. W. Nuzum's signature?

A. It is his signature.

Q. And do you know what check of $2500.00 that refers to?

A. To the check I just identified.

Mr. Potts: We offer in evidence Plaintiff's Exhibit No. 20 (hands to counsel).

Mr. Wayne: We object to that as immaterial.

The Court: It will be admitted.

Plaintiff's Exhibit No. 20, admitted in evidence.

Letter of A. C. Frost, marked as Plaintiff's Exhibit No. 21, for identification.

Mr. Potts:

Q. Plaintiff's Exhibit 21 purports to be a letter signed by you, Mr. Frost, is that correct?

A. Yes.

Q. And to what does it refer, without reciting the contents.

A. Advising that $3500.00 had been transferred to credit of Coeur d'Alene Mines Corporation.

Q. For what purpose?

A. For 35,000 shares of Treasury stock.

Q. For what month?

A. January 1935.

Q. Being the January 10th, 1935, payment specified in the option agreement?

A. Yes.

Mr. Potts: No. 21 is offered in evidence with leave to substitute a copy.

[fol. 39] Mr. Wayne: It is objected to.

The Court: Overruled. It will be admitted.

Plaintiff's Exhibit No. 21, admitted in evidence.

Plaintiff's Exhibit No. 22, being a letter of Coeur d'Alene Mines Corporation, addressed to A. C. Frost, dated January 17, 1935, marked for identification.

Mr. Potts:

Q. What is Plaintiff's Exhibit 22, Mr. Frost?

A. Letter of Coeur d'Alene Mines Corporation, signed by F. E. Coffeen, Secretary, addressed to A. C. Frost, dated January 17, 1935.

Q. Did you receive that letter—did you receive that letter?

A. I did.

Mr. Potts: We offer in evidence, Plaintiff's Exhibit No. 22. (Hands to counsel.)

Mr. Wayne: Objected to as immaterial for the reason there is no controversy as to those payments having been made. They were admitted in the answer.

Mr. Potts: This is to show more than that.

The Court: It will be admitted.

Plaintiff's Exhibit No. 22, admitted in evidence.

Plaintiff's Exhibit No. 23, being a letter from Coeur d'Alene Mines Corporation, addressed to A. C. Frost, dated March 27, 1935, marked for identification.

[fol. 40] Mr. Potts:

Q. What is Plaintiff's Exhibit No. 23?

A. A letter from Coeur d'Alene Mines Corporation, by F. E. Coffeen, Secretary, addressed to A. C. Frost, dated March 27, 1935.

Mr. Potts: Plaintiff's Exhibit 23, is offered in evidence. (Hands to counsel.)

Mr. Wayne: Same objection to it on the grounds it is immaterial.

The Court: Overruled. It will be admitted.

Plaintiff's Exhibit 23, admitted in evidence.

Mr. Potts: This would be a very convenient time for me to break into this testimony before starting on another type of examination.

The Court: We will recess until 9:30 tomorrow morning.

February 9, 1938, 9:40 A. M.

This matter came regularly on for hearing as above noted pursuant to recess, February 8, 1938.

(Mr. Frost resumes the witness stand.)

Plaintiff's Exhibit No. 24, being a letter from Coeur d'Alene Mines Corporation to A. C. Frost, dated December 13, 1934, marked for identification.

Mr. Potts:

Q. I hand you Plaintiff's Exhibit No. 24 and I will ask you what that is?

A. A letter from Coeur d'Alene Mines Corporation, by [fol. 41] F. E. Coffeeen, Secretary, to A. C. Frost, dated December 13, 1934.

Q. Did you receive that letter at or about that time?

A. Yes, the following day.

Mr. Potts: I offer in evidence Plaintiff's Exhibit 24.

Mr. Wayne: Objected to as immaterial, there being no controversy in regards to that.

The Court: It will be admitted.

Plaintiff's Exhibit No. 24, admitted in evidence.

Mr. Potts: This letter, Plaintiff's Exhibit 24, reads as follows "Yours of the 12th instant inclosing copies of the assignment of the option agreement of September 8, 1934 from W. J. Boland to A. C. Frost & Company received." Then follows the paragraph with reference to issuance of 25,000 sh-res and receipt for check of $2,500.00.

Q. Mr. Frost, has the state of Washington, at any time, brought any proceedings in any court to secure forfeiture of the charter of A. C. Frost & Company?

Mr. Wayne: Objected to as incompetent, irrelevant and immaterial and not binding on this defendant and having no relevancy or materiality as to the question of whether or not it is a dis-olved corporation and entered into a contract to carry that out.

The Court: It will be admitted subject to your objection.

The Witness (Answering): No.

Mr. Potts:

Q. Mr. Frost, when we suspended last evening, you had testified or the evidence had reached the point with reference to the payment of $1000.00 in April, 1935 and the issuance of 10,000 shares for that payment. During the course of your dealings with the defendant corporation [fol. 42] under this contract of September 10, 1934, did you follow any other course or method in taking up the stock covered by that agreement and make payments to the corporation?

Mr. Wayne: Objected to that as immaterial. No controversy over the payments that were made down to April 10—down to April 6th. There is no controversy here as to the payments that were made. They are admitted by the answer. The last payment that we admit being that of April 26, 1935.

The Court: You may answer. This objection overruled.

Witness (Answering): Yes.

Mr. Potts:

Q. And what was that method which was followed generally speaking?

Mr. Wayne: Same objection to that question and to all this line of testimony.

The Court: Overruled.

Witness (Answering): Mr. Nuzem suggested the sale of Treasury stock be credited to the account.

Mr. Potts:

Q. And how was that shown in a general way?

A. The stock was delivered to the prospective—or the purchaser and credited to our option contract.

Q. What portion of the proceeds?

A. Ten cents a share.

Q. Now, do you recall a transaction of this character in the month of January, 1935, which resulted in a sale to or through a man by the name of Starmount?

A. Yes.

Plaintiff's Exhibit No. 25, being a letter from R. W.
[fol. 43] Nuzum, under date of January 29, 1935, marked for identification.

Mr. Potts:

Q. I hand you Plaintiff's Exhibit 25, purporting to be a letter from R. W. Nuzum, to you, under date of January 29, 1935, marked for identification, and ask you to state if that letter refers to that transaction about which I have just asked you?

A. It does.

Q. Did you receive that letter from Mr. Nuzum?

A. Yes.

Mr. Potts: We offer Plaintiff's Exhibit 25. (Hands to counsel.)

Mr. Wayne: Object to that as immaterial.

The Court: Overruled. It will be admitted.

Plaintiff's Exhibit No, 25, admitted in evidence.

Mr. Potts:

Q. I call your attention to the last paragraph of this letter of January 29, 1935, being Plaintiff's Exhibit 25, "I am writing this hurri-dly and will let you know later about the matter of which we talked over the phone today. Mr. Starmount came in this afternoon and said he would place the 20,000 shares at twenty cents. If so we shall issue 20,000 shares to him and 20,000 shares to you as that would pay for 40,000 shares, and we would want a written authorization from you to dispose of the 20,000 shares to be taken out of the stock covered by your option." In response to that letter did you furnish such authorization to the Defendant corporation?

A. Yes.

Carbon copy of letter from A. C. Frost to Coeur d'Alene
[fol. 44] Mines Corporation, dated January 30, 1935, marked Plaintiff's Exhibit No. 26, for identification.

Mr. Potts:

Q. And is this a carbon copy marked Plaintiff's Exhibit 26—is this a carbon copy of that authorization?

A. Yes, it is.

Mr. Potts: We offer in evidence Plaintiff's Exhibit 26. (Hands to counsel.)

Mr. Wayne: We object to it first as being immaterial but also upon the grounds that it is incompetent. It is a carbon copy of something.

Mr. Potts (to counsel): May we have the original please.

Q. Handing you Plaintiff's Exhibit marked 26, is that the original of the carbon copy I showed you?

A. It is.

Mr. Potts: Now we offer in evidence Plaintiff's Exhibit 26.

Mr. Wayne: We renew our objection that it is immaterial.

The Court: The objection will be overruled.

Plaintiff's Exhibit No. 26 admitted in evidence.

Mr. Potts: I ask leave to withdraw the original of Plaintiff's Exhibit No. 26 and substitute a carbon copy that is identified.

The Court: Any objections?

Mr. Wayne: Well I don't really think it is a complete carbon copy.

Mr. Potts: It is a complete carbon copy except the signature which I wish now to have corrected.

Mr. Wayne: Well if the signature is corrected we are not objecting to the introduction of the carbon copy.

[fol. 45] Mr. Potts: Of course we would prefer leaving the original in evidence as far as I am concerned.

Letter from R. W. Nuzum, addressed to A. C. Frost & Company, dated January 30, 1935, marked as Plaintiff's No. 27, for identification.

Mr. Potts:

Q. Handing you Plaintiff's Exhibit No. 27, just state what that is?

A. Letter from R. W. Nuzum addressed to A. C. Frost & Company, dated January 30, 1935.

Q. Relating to the same transaction?

A. Yes.

Mr. Potts: We offer Plaintiff's Exhibit No. 27. (Hands to counsel.)

Mr. Wayne: Objected to as immaterial.

The Court: Overruled.

Plaintiff's Exhibit No. 27, admitted in evidence.

Mr. Potts:

Q. I call your attention to the last paragraph of that letter reading "a man called today and took 1,000 shares of your stock at 20¢. I am satisfied more will be taken within the next few days, and hope to market the whole of the 20,000 shares." You may state what became of the proceeds of that 1,000 shares, if you know?

A. Supposed to have been credited on the option contract.

Q. Was it ever paid to you in case?

A. No.

Q. Or to the plaintiff—or to the plaintiff's in cash?

A. No.

[fol. 46] Q. Under the agreement of September 10, 1934 and as modified in April, 1935, the evidence shows that there was a payment of $2,000.00 to be made for 20,000 shares of stock on May 10, 1935. Did the Plaintiff make that payment, Mr. Frost?

A. Yes.

Q. In what manner?

A. This sale of 80,000 shares to E. J. Gibson & Company.

Q. 80,000 shares of what?

A. Treasury Stock.

Q. When was that sale made?

A. On May 8th.

Q. Of what year?

A. 1935.

Q. And for what price was the 80,000 shares sold to E. J. Gibson & Company?

Mr. Wayne: If he knows.

The Court: If he knows.

Mr. Potts:

Q. Did you make the sale—did you direct the sale?

A. I did.

Q. Authorized it?

A. I did.

Q. And do you know the price that was received?
A. I do.
Q. And for what price was the stock sold?
A. 40,000 at 25¢ and 40,000 at 30¢ a share.
Q. What was the total proceeds of that sale?
A. $22,000.00.

The Court: Net or gross?

Mr. Potts:

[fol. 47] Q. Net or gross, he asks?
A. That was gross $22,000.00—net of $22,000.00.
Q. Where did the proceeds of the sale of that 80,000 shares go—where did they go—who got the money?
A. I instructed—I didn't—some was laid by—over long distance telephone by Mr. Gibson—told me in Vancouver he wanted 20,000 shares at 25¢ a share. I agreed to seel him 20,000 at 25¢ and 1,000 at 30¢. Then I telephoned Mr. Nuzem to deliver that stock and accept $22,000.00 and deduct $8,000.00 and remit to me the balance.
Q. Deduct $8,000.00 for what purpose?
A. To apply on the purchase price of the option stock.
Q. At what price per share?
A. 10¢ a share.
Q. Alright, what was done?
A. I was in Vancouver several days when I returned to Spokane—Seattle, and I had received no remittance from Mr. Nuzem, so I telephoned him. He said he wanted to talk to me about it first. But he remitted the $3,000.00 that day on account and in a day or two later I was in Spokane and he first contended that by reason of not having made the payment that I was not entitled to the profit. He stated he had spent much time in connection with the transaction and the affairs of the Company and thought he was entitled to part of the profit. I pointed out to him the option was in standing according to our supplemental agreement, and there was no reason for his demands but rather than have any feeling in the matter and for his full cooperation I offered him —I told him I would give him 25% of the profit.
Q. That is over the 10¢ a share for the purchase price?
[fol. 48] A. Pardon?
Q. When you say profits you made, the amount you realized over the amount of 10¢ per share of the purchase price?
A. Yes.

Q. Alright, what arrangement was made?
A. What is that?
Q. What arrangements did you make then?

The Court: He stated he gave him 25%.

Mr. Potts: He said he agreed to give him 25%. Was the arrangement concluded in the same manner?

A. Mr. Nuzum accepted $3500.00 and another $1000.00 for the payment to the Spokane & Eastern and made out to me the advance for the balance, $9500.00 we received.

Q. What became of the $8,000.00 of those proceeds?

A. $8,000.00 was retained by the Coeur d'Alene Mines Corporation in payment of 80,000 shares at 10¢ a share.

Q. And do you know when the Coeur d'Alene Mines Corporation received the proceeds of the sale of that stock?

A. Only from the report of the auditors.

Q. When was it when you concluded the arrangement for that division of the proceeds with Mr. Nuzum—what date?

A. 11th of May.

Q. And what is the fact as to whether or not the sale had been made and completed prior to that date, prior to the 11th of May when you completed your arrangement with Mr. Nuzum?

A. Gibson reported he bought 22,000 of the corporation on the 9th of May and the audit shows as of that date.

Q. Now as to that transaction, was there a similar transaction in the month of June or in the latter part of the month —start in the latter part of the month of May and con-
[fol. 49] cluded in the month of June?

A. A sale of 20,000 shares to E. Jones & Company in Kellogg.

Q. I direct your attention to the fact that in your letter of May 11th, 1935, to the Coeur d'Alene Mines Corporation, introduced in evidence as Plaintiff's Exhibit 14, this statement is made "I am willing that the proceeds from the sale of treasury stock for the sale of the next 20,000 shares shall be placed in treasury" and so forth—". What 20,000 shares did that statement refer to?

A. Mr. J. E. Jones wanted the 20,000 shares of the Treasury stock taken up in five thousand installments.

Q. Was there any negotiation pending with reference to taking 20,000 shares at the time that letter was written?

A. No, I don't think so.

Q. What 20,000 shares did that refer to?
A. To complete 100,000 shares.

The Court: That is all added to the 80,000 Gibson had?

A. To complete—I am not clear—I don't think that Jones transaction had been discussed at that time or the deal made—discussed but no sale had been made but it was agreed that Jones should have 20,000 of that stock which should be divided a profit over and above the proceeds over and above the 10¢ to be divided with Mr. Nuzum as I had proposed in order to provide funds to pay for the property voluntarily offered that all the proceeds from the stock should go into the Treasury.

Q. Mr. Frost, I am referring to the 20,000 shares. Was that 20,000 shares afterwards sold?

A. On May 11th.

Q. Was that 20,000 shares mentioned on May 11th, after-
[fol. 50] wards sold?

A. Yes it was.

Q. To whom?

A. To J. E. Jones.

Q. J. E. Jones, is this?

A. J. E. Jones & Company.

Letter from R. W. Nuzum to A. C. Frost, dated June 25, 1935, marked as Plaintiff's Exhibit #28, for identification.

Mr. Potts:

Q. Plaintiff's Exhibit No. 28, purporting to be signed by R. W. Nuzum, addressed to A. C. Frost, June 25, 1935, does that letter relate to the transaction of which I have just questioned you?

A. Yes.

Q. Did you receive that letter from Mr. Nuzum?

A. I did.

Q. Did you receive a check payable to A. C. Frost & Co., for $1,500.00 mentioned in the letter?

A. I did.

Mr. Potts: Offer in evidence Plaintiff's Exhibit No. 28. (Hands to counsel.)

Mr. Wayne: No objection to 28 except a general one.

The Court: It will be admitted. The objection is overruled.

Plaintiff's Exhibit No. 28, admitted in evidence.

Mr. Potts:

Q. How many shares of that block of 20,000 shares did that remittance cover, Mr. Frost?

[fol. 51] A. 5,000.

Q. 5,000 share-?

A. Yes.

Q. What was the price at which it was sold?

A. Fifty cents per share.

Q. Fifty cents per share. And of the proceeds of $2,500.00 received for the sale of 5,000 shares, in addition to the check for $1,500.00 sent you, what became of the other $1,000.00?

Mr. Wayne: Objected to as incompetent. It is a cross-examination of his own witness of his own exhibit. Exhibit shows what became of it. Your Honor has seen the exhibit.

The Court: I haven't seen it.

Mr. Potts: Well I am agreeable, it isn't cross-examination but it is explained in there.

Witness Answering: Five Hundred was in payment of 5,000 shares at 10¢ a share and Five Hundred retained by Mr. Nuzum for his share in the profit.

The Court: This is under the agreement? Now this share retained by Mr. Nuzum individually or as an officer of the company?

Witness Answering: Individually I imagine.

Mr. Wayne: May I move that the answer to your Honor's question be stricken as not responsive and not based upon knowledge of the witness. He said Mr. Nuzum personally as he imagined.

The Court: That is true but the answer may stand.

Letter from R. W. Nuzum to A. C. Frost, dated June 26, 1936 marked as Plaintiff's Exhibit No. 29, for identification.

Mr. Potts:

[fol. 52] Q. Plaintiff's Exhibit No. 29 purporting to be a letter from R. W. Nuzum to A. C. Frost, dated June 26, 1935, is that such a letter?

A. Yes.

Q. And did you receive that from Mr. Nuzum?

A. I did.

Q. Did you receive an inclosure mentioned in the letter?

A. I did.

Q. And just state what relation that letter the remittance as to this 20,000 shares of stock sold to J. E. Jones Brokerage Company has about which you have been testifying?

A. It is the sale inclosing the check for $1,500.00 proceeds of another 5,000 shares.

Q. Sold at what price?

A. Sold at 50¢ per share.

Mr. Potts: We offer in evidence Plaintiff's Exhibit 29. (Hands to counsel.)

Mr. Wayne: Just the general objection.

The Court: Overruled.

Plaintiff's Exhibit No. 29 admitted in evidence.

Mr. Potts:

Q. This letter, Plaintiff's Exhibit No. 29, contains this statement, "$500.00 is being places to the credit of the Coeur d'Alene Mines Corporation, out of this $2,500.00 remittance". You may state what that $500.00 represented or for what purpose it was placed to the credit?

A. Payment for 5,000 shares of Treasury Stock under option agreement.

Q. Did you subsequently and prior to the 14th day of [fol. 53] June, 1935, receive another remittance for the sale of one third block of 5,000 shares of that stock from Frost (apparently should be Nuzum)?

A. Yes.

Q. Have you been able to find the letter or any letter accompanying that remittance?

A. No.

Q. Here is a memorandum—do you recall just when that momento was made or anything about it?

A. I do.

Q. Where was this with reference—where was it produced from at this time?

A. Made by our secretary.

Q. Was it among your files and records?

A. Yes.

Q. What is the fact as to whether the one third block of 5,000 shares——

A. This memorandum——

Mr. Wayne: Objected testifying to those memorandums.

The Court: Sustained.

Mr. Potts:

Q. Well, do you have independent recollection, Mr. Frost, in regards to this one third block of 5,000 shares?

A. Certainly.

Q. Just state what sale was made?

A. This was made for one third block same as before $500.00 payment.

Q. And the proceeds?

A. $1,500.00 to me and advised they would credit us with $500.00 on payment of 5,000 shares of Treasury Stock.

[fol. 54] Letter from R. W. Nuzem to A. C. Frost and A. C. Frost & Company, dated June 14th, 1935, marked as Plaintiff's Exhibit No. 30, for identification.

Mr. Potts:

Q. What is Plaintiff's Exhibit No. 30?

A. Letter from R. W. Nuzem to A. C. Frost and A. C. Frost & Company, dated June 14, 1935.

Q. And what does it relate to if you know?

A. Reporting on the sale of the fourth block of 5,000 shares to Gibson & Company.

Q. Another to whom?

A. To J. E. Jones & Company a brokerage corporation.

Q. You received this letter from Mr. Nuzem and the check therein?

A. I did.

Mr. Potts: We offer in evidence Plaintiff's No. 30. (Hands to counsel.)

Mr. Wayne: Object to that on the general grounds and furthermore upon the grounds that it is a letter not even purporting to have been written by R. W. Nuzem, as officer of the Defendant Corporation. Refers to an individual transaction between he and the Plaintiff.

The Court: That is a question that entered the Court's mind.

Mr. Potts: It has no bearing on the question of money going to the credit of the plaintiff company in payment of the stock. That is the purpose of it. We are not concerned with the other phase of the matter. We are proving the sale of this stock and the payment to the defendant cor-
[fol. 55] poration of the purchase price under the option agreement.

The Court: Objection overruled. It will be admitted.

Plaintiff's Exhibit No. 30, admitted in evidence.

Mr. Wayne: What is the date of that letter, Mr. Potts.

Mr. Potts: June 14, 1935.

In this letter this statement is made, "pursuant to our understanding $500.00 of that $2,500.00 is being placed to the credit of the Coeur d'Alene Mines Corporation."

Q. For what purpose was that placed to the credit of the Coeur d'Alene Mines Corporation?

A. Payment of 5,000 shares of Treasury Stock under the option agreement.

Q. Mr. Frost, in addition to the Starmount item of 1,000 shares, E. J. Gibson & Company, an item of 80,000 shares to J. E. Jones Brokerage Company, an item of 20,000 shares of the Treasury Stock as sold, about which you have testified, do you recall any other item or a small item of 500 shares sold in June 1935?

A. Mr. Nuzem reported having sold—having made that sale and having credited it to the option agreement.

Q. Now in addition to all these——

The Court: Just a moment, does that letter say credited to the option agreement?

Mr. Wayne: There is no letter on that.

Mr. Potts: The original letter says it is being placed to the credit of Coeur d'Alene Mines Corporation on each of the letters that is the reading of the letters. Each of these credits represen-ed the 10¢ a share the purchase price under the option agreement.

Q. In addition to the shares sold about which you have [fol. 56] just testified, were other shares of this stock sold, to your knowledge, Mr. Frost, by Mr. Nuzum?

A. Mr. Nuzum reported that he sold 90,000 shares without my consent but at the meeting of May 11, we acquiesced with the understanding that 10¢ a share should be applied on the option agreement and the nine thousand placed to my credit. Credit of A. C. Frost & Company,

Q. Do you know at what price that stock was sold?

A. Mr. Nuzum reported he received 19¢ for them.

Q. Subsequently after May 11th, 1935 did you receive any further report or information from Mr. Nuzum as to a further sale of some amount of this stock?

A. After what date?

Q. After May 11th, 1935. Calling your attention to the item of 10,000 shares, do you recall that?

A. Mr. Nuzum later stated—sometime later—that this stock he sold would run up to 100,000 shares.

Q. He said he had sold.

A. He said he had sold under the option agreement.

Q. Have you any knowledge as to whom that 10,000 shares over and above that 90,000 was sold?

A. I acquiesced in it with the understanding——

Q. I say, have you any knowledge as to whom it was sold?

A. No I have not.

Q. Have you prepared a tabulation, showing the payments required under the option agreement of September 10, 1934, as modified by the subsequent*le* agreement in evidence up to and including the tenth day of September, 1935. Showing the amount of money they paid each month and the shares to be paid each month—to be issued each month and paid for and the total number of shares paid for, in-
[fol. 57] cluding the payments?

A. Yes.

Q. Of September 10, 1935?

A. Yes.

Payments required under option agreement of September 10, 1934 as modified, marked as Plaintiff's Exhibit No. 31, for identification.

Mr. Potts:

Q. What is Plaintiff's Exhibit No. 31?

A. It is——

Q. Is that the list I just referred to?

A. It is a memorandum.

Q. Is that correct so far as the payments required in listing them according to the agreement?

A. Yes.

Q. And the modification?

A. Yes, it is.

Mr. Potts: We offer in evidence plaintiff's Exhibit No. 31. (Hands to counsel.)

Mr. Wayne: Objected to as incompetent, if your Honor please. It purports to be a statement made up by or for this witness of what according to his interpretation of this

Boland agreement and what he calls a modification of it would have been the payments on these respective dates.

Mr. Potts: Yes, that is all it purports to be. It is for the purpose of tabulative illustration. That is all it is for. Statement of payments required under the option agreement as we calculate it which was modified, and we contend, as it should be made. It is to illustrate and show [fol. 58] what was required according to our contentions—our theory of the case.

Mr. Wayne: Well, those exhibits are all in.

Mr. Potts: Yes, but it would help the court, I think, to understand the evidence a little better perhaps.

The Court: I see no objection to it. I will overrule the objection. It may be admitted.

Plaintiff's Exhibit No. 31, admitted in evidence.

Paper showing payments made by W. J. Boland and A. C. Frost & Company under option agreement of September 10, 1934, as modified, marked as Plaintiff's Exhibit No. 32, for identification.

Mr. Potts:

Q. Have you prepared a statement or stipulation showing the payments actually made and by or through W. J. Boland and A. C. Frost & Company and the number of shares issued and the number of shares which were sold in the various transactions about which you have just testified together with the additional 10,000 shares for which you just stated Mr. Nuzum told you had been sold, Mr. Frost?

A. Yes.

Q. Is Plaintiff's Exhibit 32 that statement or tabulation?

A. That is correct.

Q. And is this tabulation correct to the best of your knowledge and information?

A. Yes.

Q. Based on your records?

A. According to our records.

[fol. 59] Mr. Potts: We offer in evidence Plaintiff's Exhibit No. 32. (Hands to counsel.)

The Court: Where are those records?

Mr. Potts: Of course, when he referrs to the records, he means the correspondence.

The Court: Did you keep any books?

Mr. Frost, Answering: Yes, except the record sale reported by Mr. Nuzum which as to that is a matter of record. And the record from the auditors. We had an audit made and we have the anditor's report here.

Mr. Wayne: Objected to as being incompetent, irrelevant and immaterial and based in part at least, upon hearsay, not anyway binding upon the defendant.

The Court: Well that statement embracing the figures which this witness claims were transactions made under the agreement.

Mr. Potts: Those are figures to which he just testified, simply tabulated them. He testified to every item on that statement.

Mr. Wayne: Yes, but sometimes he referrs simply to what Mr. Nuzum told him. Mr. Nuzum, as an individual.

Mr. Potts: Not as an individual. Mr. Nuzum was President of this Defendant Corporation which he was dealing with this contract and stock and sold by it as a contract by this corporation. (Argument by counsel.)

Mr. Potts (continuing): Showing in concrete form what the conditions of the contract were under this witnesse's testimony.

Mr. Wayne: It would be only a case of the claimants records where you might make tabulations of them. It is secondary evidence.

[fol. 60] The Court: I will permit it subject to the objection of counsel.

Plaintiff's Exhibit No. 32, admitted in evidence.

Mr. Potts:

Q. Mr. Frost, did you have a conference or discussion with Mr. R. W. Nuzum, President of the Defendant Corporation, sometime in the latter part of June, 1935, with reference to the further delivery of stock under the option agreement of September 10, 1934?

A. Yes.

Q. Where was that conference?

A. In Mr. Nuzum's office, Spokane.

Q. Do you know the date?

A. The 29th of June.

Q. Prior to that time when had you seen Mr. Nuzum with reference to that meeting?

A. He was in Seattle the day before and had dinner with me.

Q. When had the matter been discussed prior to that time the question of continuing delivery of stock under the option agreement?

A. Mr. Nuzum, on these two occasions, expressed——

Q. Well I am asking you before that and you had discussion—did you have any discussion about it?

A. About what?

Q. About continuing the delivery of stock under the option agreement?

A. No, not prior to that date.

Q. Prior to that time had you had any discussion with [fol. 61] reference to the matter of selling the stock on the Spokane stock exchange?

A. Yes, I kept up a continuing effort from the first conference with Mr. Nuzum November 1934 represented by telephone calls, personal visits to Spokane and some twenty letters—registered letters about the registration of the stock?

Q. What happened at this meeting on June 29th, 1935 in Spokane, with reference to that matter?

A. Mr. Nuzum expressed that he would not issue any more stock until the stock was listed and registered.

Q. What, if anything, was said with reference to proceeding to have it listed or registered?

A. He promised to proceed to with all possible speed.

Q. Was anything said about anything else being done before proceeding with the registration?

A. He wanted the property paid for.

Q. Did you write Mr. Nuzum letters at different times with reference to this matter of the listing of the stock and having it registered?

A. Yes sir.

Q. With the S. E. C.?

A. A great many.

Mr. Potts: On notice to produce I request the letter of November 1st, 1935.

Mr. Wayne: Here it is Mr. Potts.

Letter of February 1st, 1935, addressed to Mr. R. W. Nuzum from A. C. Frost, marked as Plaintiff's Exhibit No. 33 for identification.

Mr. Potts:

[fol. 62] Q. I hand you Plaintiff's Exhibit 33 and I will ask you to state if you ever saw that before?

A. Yes.

Q. What is it?

A. My letter of February 1, 1935 to Mr. R. W. Nuzum, President of the Coeur d'Alene Mines Corporation.

Mr. Potts: We offer in evidence Plaintiff's Exhibit 33.

(Note: Thereupon the court declared a short recess.)

(The matter was again taken up after recess.) (Mr. Frost again resumes the witness stand.)

Mr. Wayne: We object to it on the ground it is immaterial and upon the general objections.

The Court: It will be admitted.

Plaintiff's Exhibit No. 33, admitted in evidence.

Mr. Potts:

Q. Mr. Frost, is this a carbon copy—your office carbon of plaintiff's exhibit No. 33, your letter of February 1st, 1935 which has just been received in evidence?

A. Yes.

Mr. Potts: I ask leave to withdraw the original exhibit 33 and substitute a copy. (Addressing himself to Mr. Wayne.) May we have the letter of February 2nd.

Letter addressed to R. W. Nuzum from A. C. Frost dated February 2, 1935, marked Plaintiff's Exhibit 34 for identification.

Mr. Potts:

Q. Mr. Frost, I hand you plaintiff's exhibit 34 and I will ask you to state what that is?

[fol. 63] A. My letter of February 2nd to R. W. Nuzum.

Q. And just what is that particular piece of paper that you hold in your hand?

A. That is a carbon copy of that letter.

Q. Made when?

A. February 2nd, 1935.

Q. With reference to the original letter, is that a carbon copy?

A. Yes, sir, that is a carbon copy.

Q. Has that been in your files since that time?

A. Yes, sir.

Mr. Potts: This letter is included in the notice to produce served and filed in the case and we offer the carbon copy. (Hands to counsel.)

Mr. Wayne: We make the general objection and the further objection that it is incompetent—purporting to be only a copy. However, we have not been able to find the original of that. If we do I will withdraw that part of the objection. We have tried to produce everything they asked for.

The Court: It will be admitted subject to that objection.

Plaintiff's Exhibit No. 34 admitted in evidence (Subject to objection), copy of letter, Feb. 5, 1935, Frost to Nuzum, marked as Plaintiffs' Exhibit No. 35 for identification.

Mr. Potts:

Q. What is plaintiff's exhibit No. 35, Mr. Frost?

A. My letter of February 5th, 1935, to R. W. Nuzum.

Mr. Potts: We offer in evidence plaintiff's exhibit No. 35. (Hands to counsel.)

[fol. 64] Mr. Wayne: I make only the general objection to this.

The Court: Be admitted subject.

Plaintiff's Exhibit No. 35 admitted (Subject to objection) in evidence.

Mr. Potts: I ask leave to withdraw the original and substitute a carbon copy.

Mr. Wayne: I take it that all these carobns have the signature on them.

Mr. Potts: We are putting it on. We are not offering these carbon copies without their signature. We have completed it. (Hands counsel.)

Mr. Potts:

Q. Letter of February 7th, 1935. (Hands copy to counsel.)

Letter, February 7th, 1935, Frost to Nuzum marked Plaintiff's Exhibit No. 36 for identification.

Mr. Potts:

Q. What is plaintiff's exhibit 36?

A. Letter of A. C. Frost, dated February 7th, 1935 to R. W. Nuzum, President Coeur d'Alene Mines Corporation.

Mr. Potts: We offer in evidence plaintiff's exhibit No. 36.

Mr. Wayne: Make the same general objection to this.

The Court: Be admitted.

Plaintiff's Exhibit No. 36 admitted in evidence.

Mr. Potts: And we ask leave to withdraw the original exhibit and substitute a copy.

Q. Letter of February 15th, 1935.

Letter February 15, 1935, Frost to Nuzum marked as [fol. 65] Plaintiff's Exhibit No. 37 for identification.

Mr. Potts:

Q. What is plaintiff's exhibit No. 37?

A. Carbon copy of my letter of February 15th to R. W. Nuzum, President of Coeur d'Alene Mines Corporation.

Q. What was done with the original letter of which that is a carbon?

A. Placed in the mail chute on the day it was written.

Q. As to this carbon copy when was this made with reference to the original? When was this carbon made?

A. Simultaneous with the original.

Q. Where has it been since that time?

A. In our office files.

Mr. Potts: We offer in evidence plaintiff's exhibit No. 37 under the notice to produce.

Mr. Wayne: Same general objection and also that it is incompetent and is not binding and is not the best evidence. I will withdraw that if we find it.

The Court: Admitted subject to the objection.

Plaintiff's Exhibit No. 37 admitted in evidence (Subject to objection).

Mr. Potts:

Q. Letter of February 16th, 1935.

Letter, February 16, 1935, Frost to Nuzum, marked as Plaintiff's Exhibit No. 38 for identification.

Mr. Potts:

Q. You may state what plaintiff's exhibit No. 38 is?

A. Carbon copy of my letter of February 16th, addressed to R. W. Nuzum, president of Coeur d'Alene Mines Corporation.

[fol. 66] Q. What was done with the original of which this is a carbon?

A. The original placed in the mail chute the same date it was written—same date it is dated.

Q. Where has this carbon copy been since that time?

A. In the office files since.

Mr. Potts: We offer exhibit No. 38.

Mr. Wayne: Make the same objection to this as was made to No. 37.

The Court: Same ruling.

Plaintiff's Exhibit No. 38 admitted in evidence.

Mr. Potts:

Q. Have you a letter of February 20th, 1935?

Letter, February 20, 1935, Frost to Miss Florence Coffeen, marked Plaintiff's Exhibit No. 39 for identification.

Mr. Potts:

Q. What is plaintiff's exhibit No. 39?

A. It is my letter of February 20th addressed to Miss Florence Coffeen.

Q. Who was Miss Florence Coffeen?

A. Secretary of Coeur d'Alene Mines Corporation.

Q. I notice a "P. S." written in hand writing at the bottom of that letter after your signature?

A. Yes, sir.

Q. Was that written by you?

A. It was.

Mr. Potts: We offer in evidence plaintiff's exhibit No. 39. (Hands to counsel.)

Mr. Wayne: To which we make the general objection we [fol. 67] made to all of these.

The Court: Be admitted subject to objection.

Plaintiff's Exhibit No. 39 admitted in evidence (Subject to objection).

The Court: I presume the carbon has the "P. S." on there.

Mr. Potts: No, it does not. I will have to add that. I ask leave to withdraw the original and substitute a carbon copy and we will add the "P. S." to it to make it conform.

The Court: Yes.

Mr. Potts:

Q. Letter of February 25th, 1935.

Mr. Wayne: I make the same general objection.

Letter, February 25th, 1935, Frost to R. W. Nuzum, marked as Plaintiff's Exhibit No. 40 for identification.

Mr. Potts:

Q. Handing you plaintiff's exhibit No. 40, Mr. Frost you may state what that is?

A. My letter of February 25th to R. W. Nuzum, President of Coeur d'Alene Mines Corporation.

Q. February 25th, what year?

A. 1935.

Mr. Potts: We offer plaintiff's exhibit No. 40 in evidence.

Mr. Wayne: To which we object—make the same general objection.

The Court: Overruled. Admitted.

Plaintiff's Exhibit No. 40 admitted in evidence.

Mr. Potts: And we ask permission to withdraw the original and to substitute a copy.

[fol. 68] The Court: It may be permitted.

Mr. Potts:

Q. Letter of March 5th, 1935?

Letter March 29th, 1935, Frost to R. W. Nuzum, marked as Plaintiff's Exhibit No. 41 for identification.

Mr. Potts:

Q. Handing you plaintiff's exhibit 41, you may state what that is?

A. My letter of March 29th, 1935 to R. W. Nuzum, President of Coeur d'Alene Mines Corporation.

Mr. Potts: We offer in evidence plaintiff's exhibit No. 41. (Hands to counsel.)

Mr. Wayne: To which we make the general objection and also that it is immaterial.

The Court: Overruled.

Plaintiff's Exhibit No. 41 admitted in evidence.

Mr. Potts: We ask leave to withdraw the original and substitute a carbon copy.

The Court: It may be permitted.

Mr. Potts:

Q. Mr. Frost, directing your attention to plaintiff's exhibit No. 41, your letter of March 29th, 1935, I will ask you to state whether or not you did, after that, make a trip to Spokane to confer with Mr. Nuzum regarding the matters therein mentioned?

A. Yes.

Q. When?

A. March 31st.

Q. Did you see Mr. Nuzum at that time in Spokane?

[fol. 69] A. I did.

Q. Where?

A. In his office in the Columbia building.

Q. And what occurred with reference to the matter of listing and filing a registration statement of the stock?

A. We discussed the registration of the stock. I had sent to me a complete set of applications filled out and ready for signature and we discussed and we urged the filing of this application to list and register with the stock exchange and register with the Securities Exchange Commission.

Q. What, if anything, did Mr. Nuzum say with reference to doing that?

A. Promised to do so.

Q. Letter of June 1st, 1935 (addressed to counsel).

Letter of June 1st, 1935, Frost to R. W. Nuzum marked Plaintiff's Exhibit No. 42 for identification.

Mr. Potts:

Q. What is plaintiff's Exhibit No. 42?

A. My letter of June 1st, 1935 to R. W. Nuzum.

Mr. Potts: We offer plaintiff's exhibit No. 42 in evidence. (Hands to counsel.)

Mr. Wayne: To which we make the same objection as to the other exhibits.

The Court: Admitted subject to objection.

Plaintiff's Exhibit No. 42 admitted subject to objection.

Mr. Potts: And the usual request to withdraw the original and substitute a carbon copy.

The Court: It will be permitted.

Mr. Potts:

Q. Letter of June 6th, 1935. (To counsel.)

[fol. 70] Mr. Wayne: You have got one in there—exhibit No. 29.

Mr. Potts: That is the original letter. Very possible that is the original letter from Coeur d'Alene Mines Corporation to A. C. Frost & Company.

Mr. Wayne: You are asking for one of June 6th?

Letter of June 6th, 1935, Frost to R. W. Nuzum marked Plaintiff's Exhibit No. 43 for identification.

Mr. Potts:

Q. You may state what plaintiff's exhibit No. 43 is, Mr. Frost?

A. Carbon copy of my letter of June 6th, 1935 to R. W. Nuzum.

Q. What was done with the original of that letter?

A. The original was placed in the mail chute the same day.

Q. Where has this carbon been since that time?

A. In our office files.

Q. I call your attention to the fact that in Exhibit No. 28, a letter from R. W. Nuzum to A. C. Frost, dated June 5th, 1935, a check for $1500.00 is mentioned payable to A. C. Frost & Company. I will ask you to state whether or not in this letter of June 6th, the check referred to in the letter of June 5th is mentioned.

A. Yes, it is.

Mr. Wayne: I think the letter would show that if it is.

Mr. Potts: Well, I am just connecting it up, is all.

Mr. Wayne: You are asking for what is in the letter.

Mr. Potts: I asked him for the same thing. We are offering in evidence plaintiff's exhibit No. 43.

Mr. Wayne: Make the same general objection to it. Also [fol. 71] the objection that it is not the best evidence.

The Court: Objection overruled.

Plaintiff's Exhibit No. 43 admitted in evidence.

Mr. Potts:

Q. What is the fact, Mr. Frost, as to whether or not this letter, plaintiff's exhibit No. 43, dated June 6th, 1935, is in response to this letter of June 5th, 1935 from R. W. Nuzum?

Mr. Wayne: I submit that the letters speak for themselves.

The Court: Yes, I think so. He might have information of his own.

Letter, September 9th, 1935, R. W. Nuzum to A. C. Frost, marked Plaintiff's Exhibit No. 44 for identification.

Mr. Potts:

Q. I hand you plaintiff's exhibit No. 44 and I will ask you to state what that is, Mr. Frost?

A. Letter from R. W. Nuzum dated September 9th, 1935 addressed to me.

Q. And was that letter received?

A. Yes, sir.

Mr. Potts: We offer in evidence, plaintiff's exhibit No. 44. (Hands to counsel.)

Mr. Wayne: Make the general objection we made to the others.

The Court: Be admitted subject to the objection.

Plaintiff's Exhibit No. 44 admitted in evidence (Subject to objection).

[fol. 72] Letter, Coeur d'Alene Mines Corporation, by R. W. Nuzum, President, to A. C. Frost & Company and A. C. Frost, dated —, marked as Plaintiff's Exhibit No. 45 for identification.

Mr. Potts:

Q. I hand you plaintiff's exhibit No. 45 and I will ask you to state whether or not that was ever delivered to you and, if so, when and where?

A. That is a notice——

Q. Don't tell me what it is. Was it ever delivered to you?

A. Yes.

Q. When—when?

A. Let me refresh my memory.

Q. Look at the date of it.

A. I don't know as I recall that date—delivered to me in Spokane.

Q. If you are in doubt, look it up.

A. Unfortunately I sent for my diary—it was either that day or the following day in the City of Spokane in Mr. Witherspoon's office.

Q. That is signed by whom—you know those signatures?
A. I do. I seen——
Q. Whose signatures are they?
A. R. W. Nuzum, President and F. E. Coffeen, Secretary. of Coeur d'Alene Mines Corporation.
Q. By whom was that delivered to you?
A. By Mr.——
Q. Mr. B. H. Kizer?
[fol. 73] A. Mr. Kizer, yes.

Mr. Potts: I offer in evidence plaintiff's exhibit No. 45. (Hands to counsel.)
Mr. Wayne: No objection to this.
The Court: It will be admitted.

Plaintiff's Exhibit No. 45 admitted in evidence.

The Court: We will recess until two o'clock.

(Thereafter the matter was taken up at the appointed time.)

(Mr. Frost resumes the witness stand.)

Mr. Potts:

Q. Mr. Frost, after the delivery to you of this notice, plaintiff's exhibit No. 45, dated March 11th, 1936, did you cause any response or reply to be delivered to the defendant corporation?
A. Yes.
Q. Have you any communication of March 21, 1936?

(Last question directed to counsel.)

(To Mr. Frost:) Well, do you know, Mr. Frost, to whom that was delivered—did you deliver it yourself?
A. No.
Q. Mr. Frost, after your meeting of about June 29th, 1935, what, if anything, did you do from that time on with reference to selling or attempting to sell any of the treasury stock covered by the option agreement of September 10th, 1934, which had not already been sold and delivered to you?
A. I did nothing.
Q. Did you attempt or did you make or attempt to make any sales of it?
[fol. 74] A. No.
Q. And why did you discontinue at such attempts?

A. Because Mr. Nuzum refused to deliver the stock.

Q. Were you in a position where you could have paid for and purchased that stock from month to month as provided in the agreement and modifications if the company would have made delivery?

Mr. Wayne: Objected to as leading and suggestive.

The Court: Well, it is leading.

Mr. Potts: A type of question that cannot be asked without being leading.

The Court: That is true. You may answer.

Witness: (A.) Yes, certainly.

Mr. Potts:

Q. And were you ready and willing and able at all times thereafter to comply with the terms of that contract?

A. I was.

Mr. Wayne: Same objection.

The Court: Overruled.

Mr. Potts: After June 29th, 1935 and up to the time of the service of this notice dated March 11th, 1936, had the defendant corporation, at any time, offered to make delivery of any of the treasury stock covered by the agreement?

Mr. Wayne: Objected to as leading and suggestive and also immaterial.

The Court: He may answer.

Witness: (A.) Had they offered?

Mr. Potts:

Q. After June 29th, 1935 and up to the time of service of this notice had they offered to deliver the stock?

A. Had they offered to deliver the stock?

[fol. 75] Q. Yes?

A. No.

Q. Prior to service of this notice of March 11th, 1936, had the defendant corporation caused that listed or caused that stock to be listed on the Spokane Stock Exchange?

A. No.

Q. Had the defendant corporation, prior to that date, registered or caused to be registered or filed the registration statement with the Securities Exchange Commission?

Mr. Wayne: Same objection.

(No ruling.)

A. Not to my knowledge.

Mr. Wayne: Leading and suggestive and also immaterial and it is immaterial even under this alleged contract.

The Court: I don't know just what the ruling of the Securities Exchange Commission is as to when stock may be sold. He may answer the question.

A. Not to my knowledge.

Mr. Potts: You may examine.

Cross-examination.

Mr. Wayne:

Q. Mr. Frost, insofar as you have dealt with the defendant in this case and in the signing of letters—where you signed them simply as "A. C. Frost" you, at all times, dealt with that on behalf of A. C. Frost & Company, did you not?

A. Yes.

Q. You had no individual or personal dealings with the defendant whatsoever?

A. No. Just the corporation.

Q. In this agreement that has been introduced here—[fol. 76] Well, it is—yes, exhibit No. 9—did Boland have any interest in that agreement at any time?

A. Had no interest in it, no.

Q. As a matter of fact he took it for you, did he not or for A. C. Frost & Company?

A. He asked me if I could finance it and in response to that he negotiated a new deal with the corporation.

Q. Why did he take the agreement in his name rather than the name of A. C. Frost & Company?

A. I had an unsatisfactory experience with Mr. Nuzum early that year which, when he asked me to finance the property and at that time I intended to use the option and negotiate an option that actually became directly responsible to the complete financing of the property.

Q. Well, you knew that A. C. Frost & Company couldn't obtain such an agreement from the defendant, didn't you?

A. I had no other understanding than we have got.

Q. Well, then going back to my question, why didn't you take the agreement in the name of A. C. Frost & Company?

Mr. Potts: Objected to because it was fully answered.
The Court: Well, he may answer.

Witness: (A.) Just simply because I was in the east. Boland had negotiated with Mr. Nuzum. His company had purchased over five hundred thousand shares of the stock that I interested them in for Judge Turner for 1929 and 1930 and Boland went ahead. I didn't ask him to take it in my name or his name.

Q. Where was Boland at the time this was negotiated?
A. In Toronto, Ontario.
Q. Did he come out west to negotiate it?
A. No.

[fol. 77] Q. It was done then by correspondence?
A. Mostly telephone. I was in the east at the time.
Q. And when did you first in any way advise the defendant corporation that you—that A. C. Frost & Company was the party in interest in this agreement?
A. In November, 1924.
Q. You don't mean '24?
A. 1934.
Q. How did you notify them?
A. By letter. I asked for a conference with Mr. Nuzum.

Letter, A. C. Frost, to R. W. Nuzum, Nov. 16, 1934, marked as Defendant's Exhibit No. 46 for identification.

Mr. Wayne:

Q. Defendant's exhibit No. 46 is a letter where you expressed a wish to——
A. It is.
Q. See Mr. Nuzum? We offer exhibit No. 46.

Mr. Potts: No objection.
The Court: It will be admitted.

Defendant's Exhibit No. 46 admitted in evidence.

Mr. Wayne:

Q. And at or about that time you then gave them a copy of the assignment of the Boland agreement?
A. Shortly subsequent to that. Mr. Nuzum requested I send it.
Q. And that is the first information, so far as you know, [fol. 78] that they had that the A. C. Frost & Company were interested in this agreement?

A. That is the first direct knowledge I had I know.

Q. Now, you were familiar with the property of the Coeur d'Alene Mines Corporation since, at least, 1929, were you not?

A. In a general way, yes.

Q. And you knew that all this property was located in Shoshane County, Idaho?

A. I did.

Q. And you knew that that property consisted of an option for seventy five or one hundred thousand dollars on the Mineral Point group of claims?

A. Yes.

Q. And that they also had an option on a group of claims owned by a man by the name of H. L. Jones?

A. I believe so.

Q. The "Lonesome Pine" group?

A. Yes.

Q. Neither of these options up to that time had been exercised?

A. I understood that.

Q. And were not even partially exercised until as late as 1936?

A. I just had the information contained in the option agreement—recitals in that agreement.

Q. Do you know when the first payment was made on the Mineral Point option?

A. Yes.

Q. When?

[fol. 79] A. May—either May 10th or May 15th, 1935.

Q. Now, wasn't it '36, Mr. Frost, as a matter of fact?

A. Beg pardon?

Q. Seventy-five thousand dollars was never paid, was it?

Mr. Potts: Objected to as not proper cross-examination. And not the best evidence.

The Court: Well, he may answer.

Witness: (A.) The option agreement that was submitted recited that on or before May 15th, 1935, the property could be purchased for $75,000.00 and $100,000.00 if not paid until May 1936.

Mr. Wayne:

Q. Well, what I am getting at is when was the first payment actually made?

A. I have no direct record of that.

Q. You haven't? Don't you know, as a matter of fact, it was not made and then was only a partial payment in 1936?

A. That is what I understood.

Q. And have you any knowledge as to when the first payment was made under the Jones option?

A. I have not.

Q. Now, it was the purpose of this Boland agreement to raise money to operate these two properties and to pay the option price on them, was it not?

Mr. Potts: Objected to as incompetent and not best evidence. The agreement speaks for itself.

The Court: Yes, I think the option speaks for itself. Sustain the objection.

Witness: I realized from the beginning——

Mr. Potts: Just a moment.

[fol. 80] Witness: I beg your pardon.

Mr. Wayne: I had a purpose in the question, if your Honor please. I don't like to have to disclose it.

Q. Your purpose in taking the assignment of this Boland agreement or taking the Boland agreement originally was to raise money to finance this property in Shoshone County, Idaho, wasn't it?

A. No, not at all.

Mr. Potts: Objected to as not best evidence.

The Court: He may answer.

Mr. Wayne:

Q. And you later expressed that in your letter of May 11th, 1935 to the company, did you not?

(The above question again read.)

Mr. Potts: Objected to as not the best evidence.

Witness: The only thing I expressed——

Mr. Potts: Just a minute—The letter is evidence of its contents.

The Court: Yes, the letter is best evidence.

Mr. Potts: The letter is in evidence.

The Court: If you have a letter to that effect, why produce it.

Witness: We do.

Mr. Wayne: The letter to which I refer is exhibit No. 14.

Witness: Yes.

Q. Did you ever go up during the time you were purchasing this stock and look at the property?

A. I think I was there either two or three times during the whole period.

Q. And did you ever attend any meeting of the stockhold-
[fol. 81] ers of the corporation?

A. I attended a stockholders meeting in, I think it was early in 1936 here in Coeur d'Alene.

Q. About May 9th or 10th, was it not?

A. I believe so.

Q. And preparatory to holding that meeting you——, I withdraw that question. You never had any personal interest in this stock of the Coeur d'Alene Mines Corporation did you?

A. In what respect?

Q. In holding it?

A. A. C. Frost & Company?

Q. You personally?

A. No.

Q. And if the stock—if there was any stock that was in your name personally, it was really the stock of the A. C. Frost & Company, was it not?

A. That is correct.

Q. And whatever part you took in the stockholders meeting that you say you attended in May, 1936, you took as an officer of A. C. Frost & Company and on its behalf, did you not?

A. I represented my own stock—A. C. Frost & Company stock and some other stock.

Q. Well, you didn't have any stock except that of A. C. Frost & Company, did you?

A. Yes, some other stock was given proxies for and loaned to us.

Q. I mean as owner.

A. I represented A. C. Frost & Company stock.

Q. Then you had some proxies which you had solicited
[fol. 82] didn't you?

A. Yes.

Q. And you solicited them in behalf of A. C. Frost & Company, did you not?

A. Well, I don't know—the stockholders meeting was instigated by Kellogg people. I just joined it.

Q. Well, you say one of the parties who instigated it wasn't you?

A. No.

Q. Didn't you serve on some committee of stockholders?

A. No.

Q. Who were seeking this?

A. I never served on any committee.

Q. You made frequent trips up to Wallace and Kellogg just prior to that meeting, did you not?

A. I did.

Q. And you met with a number of stockholders?

A. I conferred with them, yes.

Q. And you solicited proxies?

A. Yes.

Mr. Potts: Object to this question or any further examination along this line because it is not proper cross-examination and is immaterial. It is going into matters long subsequent to any transactions about which the witness has been questioned on his direct examination.

Mr. Wayne: He said, if your Honor please, that A. C. Frost & Company never transacted business within the State of Idaho. That is the purpose of the cross examination to show he did.

Mr. Potts: This wouldn't be transacting business in Idaho.

Mr. Wayne: I am not willing to take your opinion on that.

[fol. 83] Mr. Potts: I am not offering it to you. I am offering my opinion to the Court. I am not charging everyone with that offer. It is not proper examination because it —a matter entirely beyond the period we have interrogated the witness on and on another question, on this proposition of doing business in Idaho, it is immaterial.

Mr. Wayne: The Supreme Court has held the financing of property in the State of Idaho is doing business within the State.

The Court: Overrule the objection. You may answer.

Call for and notice of annual meeting of the shareholders of Coeur d'Alene Mines Corp. dated April 24, 1936, marked as Defendant's Exhibit No. 47 for identification.

Mr. Potts: I overlooked as making a part of that objection the objection on the ground that since this inquiry long subsequent to the period to which the witness has been interrogated and which the transaction occur-ed and being an attempt of the defendant to terminate the transactions and it is entirely immaterial on the question of doing business in Idaho because even if a corporation did come into Idaho and was doing business for that time it would have no effect on the validity of this contract or the maintenance of this action because the Idaho statutes do not penalize the maintenance of an action and they do not prohibit the bringing of suit by a non-complying foreign corporation. There are two penalties—the penalty of taking title to real estate of non-functioning or foreign corporations that do business in the state is void. And there is the penalty of suing on a contract entered into at a time when they are not—have not [fol. 84] complied,—at a time when they were doing business in the state and having not complied and there isn't a thing in all the statutes that prohibits the maintenance of an action on a contract that was made by a non-complying foreign corporation at a time before it commenced to do business in the state, the matter of making of a contract is not a transaction of that character and is not doing business and it has been held so by our state——

Mr. Wayne: As a matter of fact is is the thing the statu-e does forebid and our Supreme Court has so held.—this matter I am coming into now was during the time before the alleged resurrection of this corporation in 1937.

Mr. Potts: And the resurrection of this corporation does not enter into this question at all. It is entirely a separate question between the corporation, and the State of Washington statutes, governed by the laws of the State of Washington. This question goes to the matter of non-compliance by a foreign corporation of the laws of the State of Idaho and as to anything that happened after March 1936 it hasn't any bearing on the subject, that is, about anything that happened after this contract was entered into. The only way this contract could be attacked or the right of the plaintiff to maintain a suit on it could be challenged because of non-compliance would be showing that at the time the contract was entered into it was doing business in the State of Idaho without having complied. (Other argument of counsel is reported but not herewith transcribed.)

The Court: Well, I don't see any reason to argue. You two can't agree, so we will take the testimony over his objection.

Mr. Wayne:

Q. Showing you Exhibit No. 47, Mr. Frost, I again ask [fol. 85] you if you were not a member of the stockholders' committee that called that meeting for May, 1936?

Mr. Potts: Object to this question as incompetent, irrelevant and immaterial and not constituting a defense to this action or proving or tending to prove that this contract was entered into in violation of the laws of Idaho and I want to make the same objection to all succeeding questions or testimony of this kind, if I may, if it may be so understood and have an exception to the ruling without taking the time to make the objections.

Mr. Wayne: That is agreeable to me.

The Court: It is agreeable to the court that -is testimony will be admitted subject to his objection.

(Question read.)

A. I was not.

Mr. Wayne:

Q. Well, do you know how your name happened to be signed to the notice?

A. Simply signed as a stockholder and not as and never was a member of any committee.

Q. Well then, you did sign the notice that went out?

A. I signed that notice.

Q. And you signed it for A. C. Frost & Company?

A. Signed it for the stock that I represented included in that three hundred thousand shares.

Q. Well, you signed it for 300500 shares?

A. Yes.

Q. How much of that was A. C. Frost & Company stock?

A. 175,000 shares.

Q. And the balance was proxies that you had?

[fol. 86] A. Borrowed stock.

Q. Borrowed stock?

— Temporarily transferred to my name so as to have 300,000 shares or ten per cent of the capital stock to demand the rights we were seeking.

Q. In securing these proxies you had to pay for some of them, had you not?

A. No, I did not pay anything for any proxy.

Q. You paid transfer fees on this stock that you were borrowing, did you not?

A. Certainly.

Q. And the internal revenue stamp tax?

A. Whatever was necessary to transfer to my name.

Q. And you hired conveyances that brought the stockholders down from Kellogg and Wallace to Coeur d'Alene, did you not?

A. No.

Q. Didn't you hire any of the conveyances?

A. Not for the conveyances. I believe I paid for the hall.

Q. Paid for the hall?

A. Paid a great part of the expenses. I don't recall having paid for bringing the stockholders down.

Q. You paid for the meal that was furnished up there, the dinner?

A. I think so.

Q. And personally attending the meeting yourself?

A. I did.

Q. And all this you did for A. C. Frost & Company?

A. For this stock of A. C. Frost & Company and others [fol. 87] that I represented.

Q. And this stock that you say was transferred in order to make up the ten per cent you didn't purchase that stock, did you?

A. No.

Q. You just borrowed it for use at that meeting?

A. I did.

Q. And I suppose you returned the stock after that meeting, did you?

A. Yes.

Q. Now, coming to the matter of this registration of this stock and the listing on the Spokane Stock Exchange, have you brought all your correspondence in regard to that here with you?

A. I think so.

Letter, A. C. Frost to R. W. Nuzum, dated April 4th, 1935, marked as Defendant's Exhibit No. 48 for identification,

Mr. Wayne: May I have leave to substitute a copy for exhibit No. 47 and any other originals we brought here.

Q. Showing you defendant's exhibit No. 48 will you state what that is, Mr. Frost—that is a letter written by you for A. C. Frost & Company, is it not?

A. Yes.

Mr. Hull:

Q. What date, Mr. Frost?

A. April——

Mr. Wayne: April 4th, 1935. We offer it in evidence. (Hands to counsel.)

Mr. Potts: We have no objection.

[fol. 88] The Court: They will be admitted.

Defendant's Exhibits No. 47 and 48 admitted in evidence.

Mr. Wayne:

Q. You say there was an application or registration statement prepared by you—I understood you to say, for the registration of this stock with the Securities Exchange Commission?

(Question read to witness.)

A. To expedite matters I got all the blanks and Mr. Nuzum furnished me with articles of incorporation and by-laws and whatever was necessary and I took them to my office and had them prepared and all the copies for the both the filing with the Standard Stock Exchange in Spokane and registering with the Securities Exchange Commission.

Q. Who prepared those papers?

A. Stenographers in my office.

Q. Did you have any attorney prepare them or work on them?

A. No.

Q. And what did you do with them?

A. Well, the preparation was principally in making copies and triplicates of all the documents that accompanied the application.

Q. You didn't actually prepare the application?

A. No, I left that for Mr. Nuzum—just the documents that accompanied the application.

Q. Copies of the articles of incorporation and By-laws? Did you make any copies of the Boland agreement?

A. I can't tell that now. I don't recall.

[fol. 89] Q. You realize, do you not, that there would be no chance to list this stock or register it, either one, as long as that agreement was outstanding?

A. Well, I did not consider it so.

Q. Well, isn't that the reason that you made the statement in your letter of April 4th, Exhibit No. 48, "If you decide to disclose the option and wish to report it in the manner that you have, then I suggest that you leave out everything after 'each and every month'."

A. It was—that is written in view of the offer that I made to leave all proceeds from this treasury stock with the company to pay for the property.

Q. Well, it wasn't until considerably after that time that you made that offer to the company.

A. I made a formal offer that what was realized from the stock—there was not sufficient money realized from the sale of 1,300,000 shares to develop the property and pay the money for the different options.

Q. The offer you speak of is defendant's exhibit No. 14 of May 11th, 1935, isn't it?

A. Yes.

Q. And your letter, to which I directed your attention is dated April 4th, 1935?

A. Yes, but I had discussed with Mr. Nuzum and had pointed out to him that the sale of treasury stock at 10¢ wouldn't accomplish the purpose as we had a large investment in it and it was put so the property was to pay for the financing.

Q. As a matter of fact you never agreed to that modification of May 11th, 1935, did you?

[fol. 90] Mr. Potts: Object to that as incompetent, and immaterial and in view of the fact that it is written evidence. Makes no difference whether he agreed to it or not, it is all in writing.

The Court: Objection overruled. He may answer.

(Question read.)

A. I volunteered it—my own proposition.

Mr. Wayne:

Q. And asked that it be taken up before the Board of directors of the Coeur d'Alene Mines Corporation, did you not?

A. I didn't ask it. I think Mr. Nuzum proposed it.

A. To confirm the authorization. I asked to confirm the authorization.

Q. You requested a certified copy of the minutes of their meeting at which they acted upon it?

A. Quite likely. I don't recall making the request. It was sent to me, I know.

Q. And then a meeting of A. C. Frost & Company directors was held and you wrote the letter of May 29th, 1935, exhibit 17, didn't you?

A. Yes.

Q. Now, was there any enclosure accompanying that letter?

A. I know of nothing except the resolution and certificate of resolution.

Q. That is the resolution attached to it now, is it?

A. I think that is correct, yes, sir.

Q. You have substituted a copy of the letter, 17, but not the enclosure. I wish to attach that and have it marked.

[fol. 91] Q. Now, in the early part of 1935 you were having considerable difficulty in meeting the payments under this agreement, were you not?

A. I was financing several mining properties and they made large demands on us. I didn't want to market any stock and I asked Mr. Nuzum for the extension. The company had the funds and didn't need it and so they consented to the extensions.

Q. And it was you who dictated this modification changing the amount of the payment, was it not.

A. I believe it was my proposition.

Q. And do you know whether that was ever acted upon by the directors of the Coeur d'Alene Mines Corporation?

Mr. Potts: Objected to as immaterial.

The Court: He may answer if he knows.

A. I have no knowledge of it.

Mr. Wayne:

Q. Up to that time you made certain payments and got your stock for all the money you paid, didn't you?

A. Yes.

Q. When was the last payment you actually made yourself for A. C. Frost & Company?

A. I will have to refresh my memory on the date from my records. April 26th, 1935.

Q. How much was that payment?

A. $1,000.00.

Q. And that was the last payment ever made by A. C. Frost & Company directly?

A. Directly, yes.

[fol. 92] Q. And you got stock for that?

A. I did.

Q. And isn't it a fact that by that time the financial conditions were such that you were no longer able to make payments under that agreement even as it had been modified, if it had been modified.

A. On the contrary. The stock was sold at twice the price. Could be marketed every day.

Q. Well, why did you want any change in the amount of payments then?

A. Because I didn't want to market any of the stock. Mr. Nuzum was advised and we had agreed to the proposition we should hold the stock and not market any—not market any until it had sufficient value to market the stock to pay for the property.

Letter, A. C. Frost to Coeur D' Alene Mines Corporation, dated April 23, 1935, marked as Defendant's Exhibit No. 49 for identification.

Q. Showing you Exhibit No. 49, you wrote that letter, did you, Mr. Frost?

A. I did.

Q. And you refer in there to remitting $1000.00 "sometime that week."

A. Yes.

Q. Did you ever remit that?

A. I will have to refresh my memory—what date was that?

Q. April 23, 1935.

[fol. 93] A. Yes, April 26th.

Q. And that was payment that had been due on April 10th, was it not?

Mr. Potts: We object to that question as not quite fair because that isn't the record. It was due on April 27th according to the testimony.

Mr. Wayne: Well, it was the April payment, anyhow.

A. April payment to the extension agreed upon with Mr. Nuzum.

Mr. Wayne: We offer No. 49 in evidence.
(Hands to counsel.)
Mr. Potts: No objection.
The Court: It will be admitted.

Defendant's Exhibit No. 49 admitted in evidence, Letter, A. C. Frost to Coeur d'Alene Mines Corporation, dated April 23, 1935, marked as Defendant's Exhibit No. 50 for identification.

Mr. Wayne:

Q. And on the same date you wrote this exhibit No. 50, didn't you?
A. Yes. This was signed in the presence of—Mr. Nuzum requested this letter for the purpose of signing the application which required and enabled him to sign the application. I took him into our secretary's room and in her presence it was stipulated and agreed that—we had no purpose whatsoever except for the purpose of enabling Mr. Nuzum to sign that application to the Securities Exchange Commission.
[fol. 94] Q. But it hadn't been prepared at that time?
A. Dictated in my office. Mr. Nuzum dictated the letter in my office.

Mr. Wayne: We offer No. 50.
Mr. Potts: No objection.
The Court: Admitted.

Defendant's Exhibit No. 50 admitted in evidence.

Mr. Wayne:

Q. Well, what part of the registration statement did Mr. Nuzum dictate in your office.
A. What part—that letter.
Q. That letter?
A. That letter.
Q. So far as you know, no registration statement was ever written up?
A. He promised to.
Q. Well, so far as you know, none was ever written up?

A. So far as I know, no registration has ever been recorded or registered with the Securities Exchange Commission or application made to the Stock Exchange.

Q. I am speaking of this time along in April and May, 1935.

A. Yes.

Q. At that time no payment had ever been made on any property being purchased by the defendant corporation, had it?

A. Mr. Nuzum reported payments on some of the properties, yes.

Q. Nothing had been paid on Mineral Point, had there?

A. Nothing on Mineral Point, no.

[fol. 95] Q. But a few small payments on Lonesome Pine?

A. Yes, and some other property, I forget which.

Q. Now, after this April payment, you say that you could have made those further payments on this agreement?

(Question again read to witness.)

A. Yes.

Q. Why didn't you make the payment due on the 16th of May then?

A. Because we had $8000.00 provided on the 8th of May.

Q. Well, as a matter of fact, you asked them to waive that payment, didn't you?

A. Pardon?

Q. You asked the company to waive the payment of May —that payment that was due in May, 1935?

A. May 10th?

Q. Yes. You asked them to waive it, didn't you?

A. Not that I know of. Not that I recall.

Q. Will you look at the minutes of that meeting, particularly the last paragraph?

A. Yes.

Q. Didn't you request the waiving of any default which had been made in those payments down to that date?

A. It was agreed that any payments which had not been made were waived up to that time.

Q. Well, that was at your suggestion and request, was it not?

A. It was mutual. Mr. Nuzum comes in with a request we sell the stock and throw it on the market or quit the thing and we absolutely wasn't interested.

[fol. 96] Q. Who was more instrumental in getting that waiver?—the party who—how the money was to be paid and the party that was going to make the payment?

A. I asked for the waiver.

Copy of special meeting, minutes of Board of Directors, Coeur d'Alene Mines Corporation, 15th day of May, 1935, marked as Defendant's Exhibit No. 51 for identification.

Mr. Wayne:

Q. Defendant's exhibit No. 51, are the minutes of the meeting to which I referred, are they not?

A. Beg pardon?

Q. These are the minutes you just referred to, are they not?

A. I think those were the ones that were sent to us.

Mr. Wayne: We offer exhibit No. 51 in evidence and ask leave to substitute a copy.

Mr. Hull: What is the date?

Mr. Wayne: Meeting of May 15th.

Mr. Potts: We have no objection.

The Court: They will be admitted.

Defendant's Exhibit No. 51 admitted in evidence.

Mr. Wayne:

Q. Now, during this same period of time that you were selling stock under this Boland option, you had some other stock that you were selling on the open market of this defendant corporation, did you not?

[fol. 97] A. I marketed all my original stock that I got in 1929, 15,000 shares.

Q. As a matter of fact, during this period from January 1st, to June 1st, 1935, did you not market some 300,000 shares of that stock?

A. Absolutely not.

Q. And at what price were you marketing that stock?

A. Of my own stock I sold 15,000 shares and I think that brought somewheres between thirty-five and forty cents. That is all I sold. The Bunker Hill Mine Corporation of Toronto had 255,000 shares. They were interested in operating north and determined to sell their stock and throw it on the market and after consulting with Mr. Nuzum I obtained an option on it and held it from the market and of

the 250,000 shares I sold 140,000 leaving 115,000 unsold at the time when the market was fifty per cent above my option price.

Q. At what price did you sell this 250,000?

A. Well, it wasn't 250,000—it was only 140,000 and 15,000 also of this we had to buy in ourselves. I have the record of the sales.

Q. Have you got it here?

A. Yes, I think so.

Q. Well, can you tell me without referring to the record at approximately what price this 240,000 shares was sold—140,000 shares?

A. It ran from thirty-five to forty cents up to seventy-five cents. But very little went up to seventy-five cents. Some went up to eighty-five cents.

Q. And over what period of time was that stock sold?

A. That was sold during May, June and July up to the [fol. 98] time Mr. Nuzum asked me to discontinue selling it.

Q. Now, prior to April 26th, 1935 when you made the last direct payment of $1000.00 on this contract, had any treasury stock been sold by the company?

A. By the company?

Q. Yes.

A. Not that I know of. Prior to what date?

Q. What is that?

A. Prior to what date?

Q. Prior to April 26th, 1935.

A. Mr. Nuzum told me that he had sold 90,000 shares and asked me to confirm it or agree to it.

Q. Did you?

A. I did on conditions that were made.

Q. Were those conditions in writing?

A. I believe they were confirmed afterwards in writing.

Q. Have you got the confirmation?

A. I think I could find it amoung our papers.

Q. Will you try to do that?

A. There is your provision that 10¢ a share should be credited on account of the option contract and 9¢ a share should be place- to our credit and the company—giving the company the use for the total amount—the full amount.

Option Bunker Hill Extension Mines Corporation, Ltd. to A. C. Frost & Company, dated 15th May, 1935, marked Defendant's Exhibit No. 52 for Identification.

Q. Mr. Frost, will you look at defendants exhibit No. 52 and tell me if you can identify that as a copy of the Bunker [fol. 99] Hill option?

A. I believe that is the option—that is the first option.

Q. You had two options then, did you?

A. I had it continued on the remaining shares until January 1st, 1936.

Option agreement, Bunker Hill Extension Mines, Ltd., and A. C. Frost & Company, dated — day of September, 1935, marked as Defendant's Exhibit No. 53 for Identification.

Q. And No. 53 is the second Bunker Hill Extension Mines, Ltd. option, isn't it?

A. I haven't yet compared it—I can't testify it is but I believe it is.

Q. What treasury stock, to your knowledge if any, was sold by the company prior to April 26th, 1935 and after January 1st of that year?

A. Of 1935?

Q. '35, yes.

A. I know of no stock except the stock which A. C. Frost & Company purchased and the 90,000, afterwards Mr. Nuzum said it was 100,000,—that Mr. Nuzum claimed he sold, and the stock sold, 80,000 shares to E. J. Gibson & Company and 20,000 to Jones.

Q. Was that all sold before April 26th?

A. No.

Q. What part of it, if you know?

A. Some—the only stock other than what A. C. Frost & [fol. 100] Company purchased prior to the May 8th sale to Gibson was what Mr. Nuzum reported and he reported 90,000 shares.

Q. Was the Gibson stock sold, the 80,000, before or after April 26th, 1935?

A. Sold on May 8th, 1935.

Q. And when was the approximately—was the 20,000 sold to J. E. Jones.

A. During the middle and latter part of May and first part of June.

Q. Now, is it your claim here that you were entitled to all of the profit on that stock?

A. I was entitled to all the price of the stock that was sold above 10¢ a share—the option price.

Q. And is it your claim that the 10¢ a share was to be applied as payments under this agreement?

A. 10¢ was to be applied on the option contract, yes.

Q. Then why did you find it necessary to get the defendant corporation to waive the May, 1935 payment?

A. Because they had the funds and Mr. Nuzum and I had agreed that it was not wise to market the stock. We wanted to build up.

Q. Well, they had already received from this stock that had been sold directly from the treasury 10¢ a share, had they not?

A. I didn't understand that question.

Q. I am speaking now of that part of the treasury stock which you say Mr. Nuzum sold before April 26th.

A. Yes.

Q. Now that 10¢ a share had been paid into the treasury of the company, hadn't it?

[fol. 101] A. I presume so. That is what he reported.

Q. Well, if that was to be applied on the option, then the May payment would have been made, wouldn't it?

A. I think it would have covered the May payment, yes.

Q. And yet you asked the company to waive this May payment?

Mr. Potts: We object to that—we object to that remark—"he asked the company to waive the May payment". I think that was contained in this document offered in evidence. I would like to have it produced.

Mr. Wayne: It is in the minutes and he says he suggested it and that goes in.

Mr. Potts: What minutes?

Mr. Wayne: May 15th.

Mr. Potts: I would like to see where it is in the minutes. I read the option and there isn't a thing said in there about May payments,—just a general waiver.

The Court: Objection overruled.

Witness: (A.) Mr. Nuzum didn't disclose the sale of the stock until after that.

Mr. Wayne:

Q. Did you know of his ever making a sale of treasury stock prior to April 26th, 1935 when he didn't ask your permission to do it before the sale was made?

A. He didn't ask my permission or my consent to that 90,000 shares of stock or the 10,000 shares he claims he sold afterwards.

Q. When did you say he did first tell you of that?

A. Sometime in April.

Q. Well, what time in April?

[fol. 102] A. Well, I had frequent conferences with him and made frequent trips to Spokane. He was in Seattle and I telephoned him. This statement was made in his office.

Q. Did he advise you when these sales of treasury stock had been made?

A. Did he what?

Q. Did he tell you when these sales of treasury stock were made?

A. No, he didn't. Always said he sold them and asked me to consent to the fact that they were taken and sold from the treasury shares from under the option—from the terms of the option.

Q. And you did consent to it?

A. I did on conditions that we recited.

Q. Did you afterwards ascertain when those sales had been made?

A. I didn't definitely ascertain, but part of it was sold afterwards, I understand.

Q. Didn't you or didn't the plaintiff have an audit of the books made?

A. I tried to get an audit as soon as Price and Waterhouse could make it in August, but they were denied and finally I employed LeMaster and Daniels of Spokane for three months afterward and they finally got the audit.

Q. When was it they finally audited the books?

(Question read.)

A. I think we got the audit and report in February, 1937. 1936—1936.

Q. Did you have LeMaster and Daniels audit these sales of Treasury stock?

[fol. 103] A. They reported on the transfers, yes.

Q. As a matter of fact, you got that information as early as November, 1935, did you not, from the audit?

A. I may have had preliminary reports, but final reports, as I recall, was February, 1936.

Q. As a matter of fact, Mr. Frost, you only had the one audit made by LeMaster, Cannon and Daniels, did you not?

A. Covering a period. They were denied use of the books and it took some three months to get the information.

Q. You never did request them to audit these sales of treasury stock, did you?

A. I asked them to audit all the books and they reported they couldn't make a complete audit.

The Court: We will recess for fifteen minutes.

(Thereafter, the matter was again taken up and Mr. Frost resumes the stand.)

Mr. Potts: We ask leave at this time, for the purpose of have a witness testify who just arrived and we can't keep here——

The Court: Sure we can keep him here if you want to subpoena him. If Counsel don't object, it is alright with the court.

Mr. Wayne: We don't object. Before you do that, the reporter told us we had not offered exhibit No. 47—two exhibits identified and not offered. However, we want to have the record and will make the offer.

Mr. Wayne: We offer No. 47 now.

Mr. Potts: And in objecting to it we have the general objection to all the testimony of that character and that will run to that exhibit.

The Court: It will be received under your objection.

[fols. 104-115] Defendant's Exhibit No. 47 admitted in evidence.

[fol. 116] A. C. Frost heretofore called as witness on his own behalf, resumes the witness stand.

(Continuation of) Cross-examination.

Mr. Wayne:

Q. Mr. Frost, you may have answered this before, but speaking of matters leading up to this stockholders meeting of May 9th or 10th, 1936, when you spoke of getting this stock through these brokers and paying the transfer fees and revenue on them, those were brokers operating up in Kellogg and Wallace Idaho, were they not?

A. I only had, I think, 10,500 shares locally. I had my stock, A. C. Frost & Company and stock of Bunker Hill Mines Corporation, that was unsold and a man in Kellogg offered his stock, I think 10,500 shares and made up to 300,500 shares.

Q. That is the stock that you are talking of now that was transferred into your name, isn't it?

A. Yes.

Q. And you got that through J. E. Jones in Kellogg, [fol. 117] did you, or part of it?

A. I did not deal with Mr. Jones.

Q. Who did get it for you?

A. I think Mr. Phillips got that 10,500 shares.

Q. Mr. Phillips lives in Kellogg?

A. Mr. Phillips lives in Kellogg.

Q. Didn't F. C. Keane get some for you too?

A. Not that I know of.

Q. Didn't you secure some of this stock from Roy Kingsbury, a broker at Wallace, Idaho.

A. None.

Q. Now, of the proxies that you solicited and obtained, by far a larger number of those were obtained for you by Kellogg and Wallace people in Shoshone County, Idaho, were they not?

A. I had very few proxies outside of my own of the 300,000 shares.

Q. How much would you say?

A. Oh, I had perhaps 50,000 shares—something.

Page from minutes of stockholders meeting marked as Defendants Exhibit No. 54 for Identification.

Mr. Wayne:

Q. Mr. Frost, I have had marked as defendant's exhibit No. 54, one page from the minutes of that meeting of the stockholders. You may read as much of it as you want—but I direct your attention to the place indicating amount of stock actually voted by you at that meeting.

A. That included A. C. Frost & Company stock as I recall it. They threw out all the stock that was in the name [fol. 118] of A. C. Frost & Company and threw out my stock in the name of A. C. Frost & Company——

Q. 227,273 shares is the stock that you *and* voted personally, isn't it?

A. All stock was in my name personally. This stock—this 300,000, yes. All the A. C. Frost & Company—all stock standing in the name of A. C. Frost and A. C. Frost & Company which included 175,000 shares all owned by A. C. Frost & Company and the shares of Bunker Hill and 10,000—I think it was 10,000—10,000 certificate from a man in Kellogg made up this 300,000 shares—the only three sets—of A. C. Frost & Company stock, Bunker Hill stock and 10,000, I think, some odd shares from Kellogg and A. C.—the committee, the majority of the committee rejected the stock standing in A. C. Frost & Company on account of the fact the company had been stricken from the records and I think that is what was left that I could vote.

Q. Now Mr. Frost, at that meeting you actually voted a total of 527,773 shares, didn't you?

A. Not my recollection, no.

Q. Well, you don't agree with the minutes?

A. No.

Q. Now, as I understood you, you said that—you said about the time that the May payments became due they had plenty of money in the treasury of the defendant corporation and that was the only reason that you consented to the sale of the treasury stock and asked that the terms of this contract be waived for that period, is that right?

A. No, I did not state they had plenty of money in treasury.

[fol. 119] Q. They had, you said, about $19,000.00, is that right?

A. Mr. Nuzum reported he sold 900,000 shares.

Q. You mean 90,000?

A. 90,000 shares, yes. And prior to the date of the next payment I made that sale to Gibson.

Q. Well, from your knowledge, can you state approximately how much money they did have on May 11th, 1935?

A. Beg pardon?

Q. May 11th, 1935?

A. Mr. Nuzum never gave me any information. Always avoided the question of how much money was on hand or how his affairs stood.

Q. Well, didn't you state in your examination here that they had about $19,000.00?

A. No, I made no such statement.

Q. And you don't know how much they did have at that time?

A. I did not know.

Q. Did you know what this obligation of the company to Nuzum & Nuzum was?

A. Nothing except what Mr. Nuzum told me that the company owed them about $5000.00.

Q. Were you familiar with the ordinary operating monthly operating expenses of the mine at that time?

A. No.

Q. Were you ever at any time?

A. No, never.

Q. Did you have any idea of what it was costing to run——

[fol. 120] A. Mr. Nuzum never would give me information and as a result I took under my right, as a stockholder and had asked for an audit and that is the only way I ever got any information out of the company.

Q. You didn't ask for an audit prior to May 11th, 1935, did you?

A. I had no audit prior to May, '35.

Q. Well, you hadn't asked for one either, had you?

A. What?

Q. You hadn't requested one before that time?

A. Yes, I had.

Q. When?

A. All through the early spring of 1935.

Q. How did you make this request for an audit? In writing or orally?

A. Request for what?—

Q. Request for an audit of the books.

A. I wrote—the request for the audit was by letter. The requests for information were oral.

Q. Have you a copy of any requests that were at that time made by letter?

A. Yes, we have a letter—wrote Mr. Nuzum a letter on the subject. August—made in August.

Q. August, what year?

A. 1935.

Q. Then, do I understand that you had not prior to May 11th, 1935, made any request in writing for an audit?

A. Yes, several. Not in writing, no—oral.

Q. That is what I mean.

A. No, not in writing.

[fol. 121] Q. Not in writing? Now, Mr. Frost, you stated this morning, I think you had made some proposition to Nuzum that after this meeting of May 15th, 1935, that you would share anything in excess—anything received on this stock in excess of 10¢ a share with him, he to receive twenty-five per cent and you fifty per cent or seventy-five per cent?

A. That is right.

Q. You made that proposition to him in writing, did you?

A. It was dictated partly by him and part-y by me in his office.

Letter, A. C. Frost & Company to R. W. Nuzum, May 11, 1935, Marked as Defendants Exhibit No. 55 for Identification.

Q. Showing you defendant's exhibit No. 55, that is the letter and proposition you referred to?

A. That is the letter.

The Court: May I see that. (Hands to the Court.)

Mr. Wayne: We offer defendants exhibit No. 55 in evidence. (Hands to counsel.)

Mr. Potts: We have no objection.

The Court: It will be admitted.

Defendants Exhibit No. 55 Admitted in Evidence.

Mr. Wayne:

Q. How did this matter of dividing up this profit on the stock come up between you and Mr. Nuzum?

A. Mr. Nuzum held up the money that was due me.

Q. On the——

[fol. 122] A. Sale of 80,000 shares to Gibson & Company.

Q. When was that sale made, if you know?

A. Sale was made on May 8th and Gibson paid the money into the company on May 9th.

The Court: Which company—which company, Mr. Frost—which company did he pay the money into?

A. Coeur d'Alene Mines Corporation.

Mr. Wayne:

Q. You mean that he paid 10¢ a share?

A. Paid $22,000.00.

Q. To the Coeur d'Alene Mines?

A. Yes.

Q. And do you know if that remained in its treasury and was used for corporate purposes or was it paid out in commission?

A. Distribution of about $8000.00 covering 25¢ a share for 80,000 shares.

Q. Remaining 22,000 shares—$22,000.00 was disbursed by the corporation, was it?

Mr. Potts: Remaining 14,000.

Mr. Wayne:

Q. 14,000?

A. $14,000.00 was disbursed by the corporation, yes.

Q. And so I get that clear, it was used in the ordinary corporation expenses, was it?

A. What?

Q. This $14,000.00?

A. No.

Q. What was it used for?

A. Mr. Nuzum sent me $3,000.00 on May 11 and on the 14th, I think, or the 15th, when I came to Spokane and had the—he stated his position with regard to feeling entitled [fol. 123] to part of the profits and I agreed that he should retain twenty-five per cent of the profit in the transaction. He paid—he gave me the balance of $6500.00 and then retained the balance.

Q. In other words, you got seventy-five per cent of the sale price of that stock over and above 10¢ per share, is that right?

A. Yes, that is right.

Q. Now, as a matter of fact, you proposed giving this commission to Mr. Nuzum, didn't you?

A. I did not.

Q. Isn't it a fact that he told you that—told you at that time, that he wanted that money to go to the corporation?

A. He did nothing of the kind.

Q. Isn't it a fact that he afterwards did assign that to the company?

A. Not that I ever had any knowledge of.

Q. Do you know one way or the other?

A. I do not.

Letter R. W. Nuzum to D. E. Watson, Dated June 15, 1936, Marked as Defendant's Exhibit No. 56 for Identification.

Q. Showing you Exhibit No. 56, Mr. Frost, have you ever seen that before?

A. Never seen or heard of it.

Q. It bears date earlier than your audit of the books, does it not—dated June 15th, 1936?

A. It is dated, that, yes.

Q. Do you know of your own knowledge he got this twenty-five per cent of the price—the sale price above 10¢ [fols. 124-131] a share on that 80,000?

A. So far as I was told by Nuzum he kept it for himself. He wanted it and expressed and demanded and wanted it and I took it for granted he took it and I had no other information.

Q. When did he tell you he kept it himself?

A. At the time and since.

Q. When was the last time he told you that?

A. At the time he deducted the money from the Jones sale of the Jones stock and also demanded profit participation in the Bunker Hill stock.

The Court: We will recess to 9:30 A. M. tomorrow.

(Thereupon court adjourned until 9:30 A. M., Feb. 10th.)

February 10th, 1938, 9:30 A. M.

* * * * * * *

[fol. 132] A. C. Frost plaintiff herein, resumes the witness stand in his own behalf.

Copy of letter, Coeur d'Alene Mines to A. C. Frost, dated April 9, 1935, marked Defendant's Exhibit No. 57 for identification.

Copy of letter, RWN to A. C. Frost dated April 12, 1935, marked as Defendant's Exhibit No. 58 for identification.

Mr. Wayne:

Q. Mr. Frost, I show you paper or letter dated April 9th, 1935, marked defendant's exhibit No. 57. Do you recall receiving the original of that record or that letter?

A. I can't positively state, but I believe that letter was [fol. 133] received. I can tell by my records.

Q. Then you have your letters here, have you?

A. Yes.

Q. Then if you do know whether you received it, will you produce the original?

A. Yes, what is the date.

Q. April 9th. Now, will you look at defendant's exhibit No. 58, a letter—copy of a letter dated April 12th, 1935. Do you recall receiving that?

A. Yes, I recall receiving that letter.

Mr. Wayne: We offer defendant's exhibit No. 58.

(Hands to counsel.)

Mr. Wayne: Look again at No. 57, and what purports to be the original of it, Mr. Frost—will you now state whether you received that?

A. Yes, sir.

Mr. Wayne: We offer No. 57 now and if you don't object on account of it being a copy——

Mr. Potts: We have no objection.

The Court: They will be admitted.

Defendant's Exhibits No. 57 and 58 admitted in evidence letter A. C. Frost to R. W. Nuzum, dated April 10, 1935, marked as defendant's exhibit No. 59 for identification.

Letter, A. C. Frost to R. W. Nuzum dated April 13, 1935, marked defendant's exhibit No. 60 for identification.

[fol. 134] Mr. Wayne:

Q. Showing you defendant's exhibit No. 59, you wrote that letter, did you?

A. I did.

Q. And No. 60?

A. Yes.

Mr. Wayne: We offer Exhibits No. 59 and 60.

(Hands to counsel.)

Mr. Hull: No objection.

The Court: They will be admitted.

Defendant's exhibits No. 59 and 60 admitted in evidence.

Mr. Wayne: In regard to these exhibits, if your Honor please, we had no agreement they should be read, but I presume that it is satisfactory they need not be read and we can use them on either side.

Mr. Potts: We stipulate to waive reading of any of these exhibits.

Copy of special meeting of Board of Directors minutes of A. C. Frost & Company, of May 20th, 1935, marked as defendant's exhibit No. 61 for identification.

Mr. Wayne:

Q. Showing you defendant's exhibit No. 61, will you state if you recall the meeting of which that purports to be a certified copy of the minutes?

A. Yes.

Q. And this was furnished under your instructions to the Coeur d'Alene Mines Corporation, was it not, this certified copy?

[fol. 135] A. No, it was not. It was handed to Mr. Nuzum in his office and prepared in his office.

Q. Handed to him personally?

A. Handed to him personally.

Mr. Wayne: We offer exhibit No. 61.

Witness: (A.) Pardon me, I want to correct that statement. The resolution was passed, of course, in my office, but the letter was written in Mr. Nuzum's office.

Mr. Wayne:

Q. The letter embodied in the minutes, you mean?

A. Pardon?

Q. The letter embodied in the minutes?

A. Yes.

(Mr. Wayne hands exhibit to counsel.)

Mr. Potts: We object to this exhibit on the ground it is immaterial since it shows on its face as it had to do with—no, I withdraw the objection—strike that.

The Court: It will be admitted.

Defendant's Exhibit No. 61 admitted in evidence. Letter, A. C. Frost to R. W. Nuzum dated June 1, 1935, marked as defendant's exhibit No. 62 for identification.

Mr. Wayne:

Q. Mr. Frost, will you read defendant's exhibit No. 62 or as much as you please of it, and then tell me if you are not mistaken about handing No. 61 to Mr. Nuzum and if, as

a matter of fact, it wasn't conveyed and was not enclosed in that letter?

[fol. 136] A. No, I am not mistaken. This letter was prepared in Mr. Nuzum's office and prepared jointly with him and handed to him. He requested a corporation resolution confirming that and the letter was dated in Spokane, May 11 and this resolution was——

Q. Passed on the 20th, is it not?

A. Yes. He got that—the resolution——

Mr. Potts: The resolution was passed on May 20th.

Mr. Wayne: Yes, and then you sent a certified copy of the resolution with this letter on June 1st?

A. I did, yes.

Q. Exhibit No. 62?

A. Yes.

Copy of letter, R. W. Nuzum to A. C. Frost, dated June 8, 1935 marked as defendant's exhibit No. 63 for identification.

Q. Will you look at Defendant's exhibit No. 63 purporting to be a copy of a letter dated June 8th, 1935 to you and tell me if you received the original of that letter?

I meant to offer No. 62.

(Hands to counsel.)

Mr. Potts: No objection to No. 62.

The Court: Admitted.

Defendant's exhibit No. 62 admitted in evidence.

Witness: (A.) Yes, I received that letter.

Mr. Wayne: We offer Defendant's exhibit No. 63.

(Hands to counsel.)

The Court: Mr. Wayne, where you are offering copies [fol. 137] it might be difficult for the court to determine whether it was an individual letter or corporation letter. You better put those signatures on.

Mr. Wayne: Yes, I am glad you made that suggestion. I imagine it would be alright to have the reporter put the signatures on if you will produce them.

Mr. Potts: Yes, it probably should be done before they are admitted.

Mr. Wayne: Would you look for one of April 3rd and one of April 5th?

Copy of letter, R. W. Nuzum to A. C. Frost, dated April 3, 1935, marked defendant's exhibit No. 64 for identification.

Copy of letter, R. W. Nuzum to A. C. Frost, dated April 5, 1935 marked defendant's exhibit No. 65 for identification.

Letter, A. C. Frost to R. W. Nuzum dated May 6th, 1935, marked as defendant's exhibit No. 66 for identification.

Q. Showing you defendant's exhibit No. 64, will you state whether you received the original of that letter?

A. I believe that was received.

Q. And No. 65, (Hands to witness)?

A. I think this letter was also received.

Q. Showing you Defendant's exhibit No. 66, that is a letter written by you, was it not?

A. Yes.

[fol. 138] Mr. Wayne: Now we offer No. 63, 64, 65 and 66 and ask leave to have the signatures placed on the copies of the letters. May we have the originals now.

Mr. Hull: Here is one. We have no objection to 63 except to being a copy.

The Court: It will be admitted.

Defendant's Exhibit No. 63 admitted in evidence.

Mr. Potts: No objection.

The Court: They will be admitted.

Defendant's Exhibits No. 64, 65 and 66 admitted in evidence.

Mr. Hull: Here is 66, there is no objection to that.

Mr. Wayne: I wasn't introducing the original to that.

Q. Mr. Frost, after looking at this correspondence, do you still say that money wasn't scarce and hard to raise in the early part of 1935?

A. It was not easy to raise, but it was possible to raise.

Q. As a matter of fact, the Coeur d'Alene Mines Corporation was continually after you to get you to make the payments?

A. No, because the funds speak for themselves.

Q. And you were continually asking for time and postponing payments, were you not?

A. No, I was not.

Q. Now, as a matter of fact, throughout this time when you were, as you testified, attempting to get the company

to register this stock with the S. E. C., and listed on the Spokane Stock Exchange, you realized that it could not be [fol. 139] either registered or listed until the property was paid for, did you not?

A. Mr. Nuzum took that position. I agreed with him on that, but I insisted from the beginning the property should be paid for from the first.

Q. And you even went to the extent of trying to get the company to make the effort of having the Mineral Point people conveying the property to the Coeur d'Alene Mines Corporation before it was paid for, didn't you?

A. I suggested—I offered to raise $25,000.00 as a first payment and asked them to accept deferred payments every two months, as I recall, of $25,000.00.

Q. As a matter of fact you wanted to give A. C. Frost notes for three payments of $25,000.00?

A. No, I never offered A. C. Frost notes.

Q. You didn't? And you were attempting, during that time, to secure a change in the terms of the option on the Mineral Point?

A. I tried to obtain for the company the benefit of a $75,000.00 in lieu of the $100,000.00 option.

Q. That is, if the property was paid for prior to May 15th, 1935 they would have saved $25,000.00 on the purchase price?

A. Yes.

Q. What amount of stock do you claim was sold by the company out of this treasury during the year 1935?

A. I have no knowledge except what Mr. Nuzum reported.

Q. Wasn't that disclosed by the audit you had made of the books?

A. In May, 1936.

[fol. 140] Q. You examined the report, didn't you?

A. The one I received in 1936. Not the preliminary report in 193—November, 1935. And I immediately wrote Mr. Nuzum in regard to it.

Q. Didn't that say——

A. Pardon?

Q. Didn't that show the amount of stock they had sold?

A. No, that November report did not. The May report 1936, showed the detail.

Q. You don't now recall the amount of that stock?

A. Pardon?

Q. You don't now recall the amount of that stock?

A. No, I don't.

Q. Well, assuming that you had a modification of the terms of the option of September 10th, 1935, it only applied to the payments falling due in May, June, July, August and September of 1935, didn't it?

Mr. Potts: Objected to as not the best evidence. The terms of the modifications being in evidence in writing.

Mr. Wayne: Well, it is already in evidence.

Mr. Potts: The correspondence—there has been no testimony of any oral modification.

Mr. Wayne: There couldn't be an oral modification.

Mr. Potts: Well, whether it could or not there is no claim there was but a discussion of the fact in the correspondence and letters stating the modification was in evidence, and they show what the modification was, what payments they applied to.

The Court: Well, of course I haven't read those letters and I don't know what is in them.

Mr. Wayne: The question is really based upon the ex-
[fol. 141] hibits already in.

Mr. Potts: Perhaps your Honor should read the letter of April 12th, plaintiff's exhibit- No. 11, 12 and 13 are the letters introduced in evidence stating the modification. (Hands to the court.) Of April 26, 1935, the modification changing the time and the amount of payments.

(Question read to the court.)

The Court: He may answer the question.

Mr. Potts: The modification is in writing and the letter of April 12th shows to what months it applied.

The Court: Yes, but the letter of April 25th shows differently.

Mr. Potts: The letter of April 25th has to be taken with the first three. They simply modify the date of the first three installments stated in the letter of April 12th.

The Court: Yes.

Mr. Potts: The dates of the first three installments had changed as follows: the letter shows "if you will send me a letter dated today, the same as your letter of April 12th, but changing the dates of the first three payments as above, you are authorized to use the enclosed bank draft for $1000.00 in payment of the first installment." This draft was received and used and stock issued for it and thereby,

excepting that the letter now merely dates the payment of the first three installments mentioned of April 12th, it is changed from April 15th to April 27th, and from June 5th to the 10th of the month and that was the modification of the agreement.

The Court: You can answer the question if you can.

(Question again read to witness.)

A. May I look at this exhibit, your Honor? It applied [fol. 142] to a certain letter. Applied to the terms of my letter of April 25th.

Mr. Wayne: Very well. And you don't take the position that had these payments been made in May, June, July, August and September that it would have completed payments under the Boland contract.

Mr. Potts: Object to that as argumentative. Don't make any difference what position he takes.

The Court: Your question is argumentative. Sustain the objection on that ground.

Mr. Wayne:

Q. There were payments falling due under the Boland option after the September 10th, 1935 payment, were there not?

A. Yes.

Q. Now, in the exhibit that has been introduced here which you say was made on May 31st, you have included only the payments down to September 10th, 1935, hadn't you?

A. Yes.

Q. Do you remember the amount of the payment for the month of October, 1935?

A. I believe it was $5000.00.

Q. Wasn't it $10,000.00?

A. Not the modified agreement.

Q. Well, where is the modification. Have you got the modification which changed the payment to $5000.00?

A. I think you have it.

Mr. Potts: It is a letter of April 12th. It is an exhibit there.

Mr. Wayne: Exhibit No. 11 is the one to which you refer, is it? (Hands to witness.)

[fol. 143] A. No, that is not the one I refer to.

Q. Isn't it—(Hands back to counsel).

A. I just had it in my hands.

Q. Won't you look at the list of payments in the paragraph next following it in Exhibit No. 11, Mr. Frost.

A. I believe this is correct but my letter confirming that he said showed——

Q. The letter you refer to is exhibit No. 12, is it? (Hands to witness.)

A. It doesn't acknowledge the letter of April 12th but I think substantially that is—that is the revised terms—states the revised terms of the option.

Q. Well, at any rate, it was your understanding they began October 10th and on the 10th day of each month thereafter and payments were to be reduced to $5000.00?

A. Yes.

Q. Now, all of this treasury stock that was sold by the company, or for its benefit, was pursuant to this, which is dated April 23rd, 1935, Defendant's exhibit No. 50, was it not?

(Hands to witness—question read.)

A. Positively not.

Q. Why then, did you write this letter, Exhibit No. 50?

A. Mr. Nuzum came to my office and discussed the application to this and registering the stock and he finally asked that by giving him such a letter that he could list it. I called in the stenographer and it was dictated in my room and when the stenographer brought it in I asked Mr. Nuzum to accompany me across the room adjoining and explained to her and asked her to witness the fact that it [fol. 144] was made at Mr. Nuzum's request for the sole and only purpose of enabling him to complete the registry application for the listing and registration of the stock and that it had no effect whatsoever on the contract or agreement.

Q. Nevertheless the company proceeded to sell treasury stock after that?

A. Not with my knowledge.

Q. You knew of their selling of 80,000?

A. That was not sold by the company. Sold by myself. I made the sale.

Q. You knew of a further sale of 20,000 to J. E. Jones?

A. That is with my consent.

Q. You knew of Nuzum himself selling either ninety or one hundred thousand?

A. Mr. Nuzum reported that to me after he claimed he already sold it.

Q. Now, will you look at this exhibit No. 50 and tell me what in that letter, what it says in the registering or listing of this stock?

A. I don't know.

Q. You don't know?

A. I asked him to explain it but he said he couldn't understand it. That is all I wanted.

Q. You signed that letter voluntarily?

A. I signed it in the presence of my—my secretary.

Q. I didn't ask you in whose presence. I asked you if you signed it voluntarily?

A. Signed it under those conditions. Not voluntarily.

Q. You mean you signed it under compulsion?

[fol. 145] A. No. It wasn't a voluntary act. Mr. Nuzum asked and I cooperated and assisted and I signed that letter in the presence of our secretary.

Q. You signed it because he asked you to?

A. Only to help accomplish the purpose he represented he wanted the letter for.

Q. What were the present market conditions you refer to in that letter?

A. The stock was selling, at that time, around—well Mr. Nuzum claimed he sold 90,000 at 19¢ prior to that.

Q. Why didn't you sell enough of it then to pay this Mineral Point bond?

A. We could have readily done so.

Q. Why didn't you?

A. Mr. Nuzum and I agreed it was not wise to do it—to sell any stock on the market.

Q. Yet you were trying to register and list the stock at that time?

A. Yes.

Q. What do you mean in your letter directed to the Coeur d'Alene Mines Corporation, Exhibit No. 50, or by this statement "you may deal with the treasury stock as you may see fit"?

A. To enable him to—on this representation he wanted that to enable him to complete the application for registration and listing of the stock.

Q. Then you meant that letter was to be used for the stock exchange and on the S. E. C. but that it wasn't good so far as you were concerned?

A. No, I didn't.

[fol. 146] Q. What did you mean by it then?

A. I complied with Mr. Nuzum's request to cooperate and assist. We were anxious to have the property paid for and take advantage of the $75,000.00 payment due the following month—the 15th of May.

Q. Did you mean by the statement "you may do with the treasury stock as you see fit" that the company had the right to do that?

A. No.

Q. Then why did you make such astatement?

A. I made it for the purpose I have already stated.

Q. Just because you were asked to do it?

A. Mr. Nuzum claimed it was essential to assist him in accomplishing the registration of the stock.

Q. Did you ever tell any of the directors of the company that you didn't mean that statement?

A. What directors? Directors of what company?

Q. Coeur d'Alene Mines Corporation.

A. I never had a chance to communicate with them. Mr. Nuzum did all the talking and acting for the company.

Q. Did you ever tell anyone connected with the defendant corporation other than Mr. Nuzum, that you didn't mean that statement?

A. No, I had no occasion to.

Mr. Wayne: I think that is all.

Redirect examination.

Mr. Potts:

Q. Mr. Frost, on the same day that you signed this letter, plaintiff's exhibit No. 50, did you also write another letter to the Coeur d'Alene Mines Corporation which I will show [fol. 147] you in just a moment,—namely, plaintiff's exhibit No. 49?

Mr. Wayne: Object to that as not proper re-direct examination. The witness has already said he did and it has been introduced in evidence.

The Court: He may answer.

(Question read.)

A. Yes, I did.

Mr. Potts:

Q. And what did you do with that letter, plaintiff's exhibit No. 49?

Mr. Wayne: Object to that as repetition. Immaterial and he has already testified.

The Court: He testified these were mailed and delivered.

Mr. Wayne: The defendant produced it and offered it himself.

Mr. Potts: What was the ruling on the question.

The Court: He answered the question.

Witness: (A.) Should I answer the question?

Mr. Potts: You answered it once.

Q. And when was this letter of April 26th, 1935, marked plaintiff's Exhibit No. 13, sent with reference to these two letters on April 23, plaintiff's exhibit No. 49 and No. 50? At or about the time it bears date?

A. Yes.

The Court: Are you through with cross-examination?

Mr. Wayne: I was through, yes.

Mr. Potts:

Q. Mr. Frost, after April 23, 1935, what is the fact as to whether or not the company gave you credit for 10¢ a share pursuant to the terms of the option agreement for all treasury stock that was sold?

Mr. Wayne: Objected to as repetition. Not proper redirect examination.

[fol. 148] The Court: He may answer. The Court's recollection isn't very clear on that.

(Question read.)

A. Yes.

The Court: That was gone into on direct examination, Mr. Potts on the contention of your case to show that the option agreement had been lived up to by the credits, as I recall.

Mr. Potts: We proved specific credits on certain transactions.

The Court: I don't know how far it went. I remember that.

Mr. Potts: That is all.

The Court: We will recess for fifteen minutes.

(Following recess the matter was again taken up.)

Mr. Wayne: If your Honor please, I do want to ask Mr. Frost one or two further questions.

Mr. Frost resumes witness stand.

Mr. Wayne:

Two page letter, A. C. Frost to R. W. Nuzum, dated February 6, 1935, marked as Defendant's Exhibit No. 67 for Identification.

Q. I am showing you defendant's exhibit No. 67 and will you state if you wrote that letter?

A. Yes.

Q. And directing your attention to this paragraph, Mr. Frost, "Payments of 25—two paragraphs——

Mr. Potts: What is the date of that letter?

Mr. Wayne: February 6th, 1935. (Continuing) "Payments of $25,000.00 June 1, 1935, $25,000.00 December 1, 1935, and $25,000.00 March 1, 1936, are satisfactory although I would prefer as a matter of caution that the last [fol. 149] payment be made April 1, 1936". Now that was your suggestion for the payment on the Mineral Point bond to save the $25,000.00, was it?

A. Yes.

Q. Now, looking at the fourth paragraph, tell me if it is not a fact that you did propose to give instead of the company notes, the notes of A. C. Frost & Company?

A. That is a fact.

Mr. Wayne: We offer No. 67.

The Court: It is admitted.

Defendants Exhibit No. 67 admitted in evidence.

Three page letter, A. C. Frost to R. W. Nuzum, dated March 5th, 1935, marked Defendant's Exhibit No. 68 for Identification.

Two page letter, A. C. Frost to R. W. Nuzum, dated March 6, 1935, marked Defendant's Exhibit No. 69 for Identification.

Mr. Wayne:

Q. Showing you defendant's exhibit No. 68 I will ask you if that is the letter which you wrote?
A. Yes.
Q. And No. 69, is that also a letter written by you?
A. Yes.

Mr. Wayne: We offer 68 and 69.
(Hands to counsel.)
Mr. Potts: No objection.
The Court: They will be admitted.

Defendant's Exhibits No. 68 and 69 admitted in evidence.

[fol. 150] Letter A. C. Frost to R. W. Nuzum dated July 8, 1935, marked Defendant's Exhibit No. 70 for Identification.

Mr. Wayne:

Q. Showing you defendant's exhibit No. 70, state whether or not that is the original of a letter written by you?
A. Yes.
Q. Did you receive a reply to that?
A. I didn't really read the letter.

(Hands letter back to witness.)

Copy of letter, R. W. Nuzum to A. C. Frost, dated July 9, 1935 marked Defendant's Exhibit No. 71 for Identification.

A. Yes. I haven't read the reply.
Q. Well, it is a letter dated July 9th, 1935. Showing you defendant's exhibit No. 71——

Mr. Potts: May I have that just for the signature?
(Hands to counsel.)
Mr. Wayne: No. 70 is July 8, 1935. (Hands to counsel.)

Witness: A. I believe that is a reply.

Mr. Potts: What is the date of the letter, Exhibit No. 71?
Mr. Wayne: It is July 9th.
Mr. Wayne: I now offer defendants Exhibit No. 70.
Mr. Potts: No objection.
The Court: It will be admitted.

Defendant's Exhibit No. 70 admitted in evidence.

Mr. Wayne: And we offer No. 71.

[fol. 151] Mr. Potts: No objection.

Mr. Wayne: May we have leave to substitute a copy that has already been marked?

The Court: 71 will be admitted.

Defendant's Exhibit No. 71 admitted in evidence.

Mr. Wayne: That is all, your Honor.

Mr. Potts: That is all. (Witness excused.)

D. E. Watson, having been heretofore sworn, recalled for cross-examination under the statute by the plaintiff.

Cross-examination (under statute).

Mr. Hull: We are calling D. E. Watson, Secretary of Coeur d'Alene Mines Corporation for cross-examination.

Q. Mr. Watson, you were secretary of the Coeur d'Alene Mines Corporation on the 30th of November, 1936, were you not?

A. I was.

Q. And during all the time that you have been secretary of the corporation you have had the books and records in your possession, have you?

A. That is correct.

Q. And you have actually kept the records?

A. Yes.

Q. That refers not only to stock books but also general ledger?

A. That is correct.

Q. The cash accounts and so on?

A. That is correct.

Q. What is the fact as to whether or not after the Boland [fol. 152] contract of September 10th, 1934, was entered into and the same stock account was set up with reference to the stock optioned by that agreement?

A. I think that we opened up an entry on the books here marked 3,300,000 shares of treasury stock as going under that contract.

Q. Didn't that entry or didn't that account refer to the Boland contract?

A. It did.

Q. And isn't it a fact that subsequently you made a transfer or notation on that account that it was now transferred to A. C. Frost & Company?

A. I think—yes, that was some memorandum within the original entry just to show we had been served with the assignment and just to call attention that A. C. Frost was making payments under the contract.

Q. Do you have that particular account here?

A. I think I can find it. (Witness goes to records.) This is the—(hands to counsel).

Q. Is it complete on that one occasion?

A. Yes, the account is complete as it stands.

Accounting sheet "Treasury Stock Optioned to W. J. Boland" marked Plaintiff's Exhibit No. 72 for Identification.

Q. I hand you this sheet and ask—that you have just shown me in answer to a previous question, which is now marked plaintiff's exhibit No. 72 for identification, and I will ask you to state what that represents?

A. Represents a general ledger control account of W. J. [fol. 153] Boland option.

Q. And that is the record of the Coeur d'Alene Mines.

A. That is the record.

Q. With reference to that particular transaction?

A. Yes, it is the record.

Mr. Hull: Q. At this time we offer in evidence plaintiff's exhibit No. 72 and of course we will ask permission to substitute a copy as this is part of their records.

(Hands to counsel.)

Mr. Wayne: No objection.

The Court: It will be admitted and a copy may be substituted.

Plaintiff's Exhibit No. 72 admitted in evidence.

Mr. Hull: Will you make a copy of that, Mr. Watson?

A. Yes, I would be pleased to.

Annual report Coeur d'Alene Mines Corporation, ending Nov. 30, 1936 marked Plaintiff's Exhibit No. 73 for Identification.

Mr. Hull:

Q. Mr. Watson, I hand you this document marked for identification as plaintiff's exhibit No. 73,—state what it is if you know?

A. Copy of annual report, dated November 30, 1936.

Q. What was the purpose of that report of what was done with it?

A. It was mailed to stockholders as a matter of information to them.

Q. Was it prepared by you?

A. It was.

[fol. 154] Q. From what source of information? That is, from the books and records of the corporation?

A. Yes, the part that deals with accounts and so on.

Q. I call your attention particularly to the item under "liabilities" in which "contingent liabilities, A. C. Frost & Company, payable out of earnings with interest at 6% thereon, $16,306.00". Just in a general way, will you explain what that refers to? That credit of $16,000? First, let me ask you this—you are familiar with the letter dated May 11th, 1935 that has been offered in evidence here, are you not?

A. I am familiar with that; yes.

Q. I will ask you to state if that credit of $16,306 is the credit—represents a credit—represents the proceeds of the sale of stock after that date?

A. After that date?

Q. After May 11th, 1935. I am speaking now of the sale of stock covered by the Boland option over and above the 10¢—purchase price of 10¢ per share and which was placed to Mr. Frost's account?

A. It does in part, but there are other items in there besides the particular items you refer to.

Q. Can you give a break-down on that $16,306.00?

A. I think I can.

Q. If you have the record here, I think I would like to see the record.

A. Well, I have drawn off an abstract of the thing and if you want the detail I can pull the original vouchers.

Q. May I see that a minute. (Hands to counsel.)

[fol. 155] Schedule No. 2 Treasury Stock under option to W. J. Boland and assigned to A. C. Frost & Co., sold to others, marked as Plaintiff's Exhibit No. 74 for identification.

Mr. Hull:

Q. I hand you this document or tabulation, marked for identification, plaintiff's exhibit No. 74 and I will ask you to state just generally what that is, Mr. Watson.

A. Well, it is an account of stock that was sold during the spring of 1935 by R. W. Nuzum and A. C. Frost the proceeds of which were in whole or in part retained by the corporation and that portion of the sale where the sale was made in excess of 10¢ a share and this shows the particular date of the sale and every credit representing the difference between 10¢ and the net amount of money that was remitted to the corporation.

Q. Now, from what records was that tabulation made?

A. Made from the original records of the corporation.

Q. By yourself?

A. By myself.

Q. In other words, this tabulation of corporate records of the amount of moneys due Mr. Frost which he agreed to leave with the company in accordance with the letter of May 11th, as the last payments that were made back to him?

A. I believe that is correct with the exception of the assignment that has been made.

Q. What was the total amount then placed to Mr. Frost—I think we shall offer this in evidence—we offer in evidence plaintiff's Exhibit No. 74.

[fol. 156] Mr. Wayne: We have no objection to No. 74.

The Court: It will be admitted.

Plaintiff's Exhibit No. 74 admitted in evidence.

Mr. Hull:

Q. Is that a copy that may remain in evidence?

A. I think so unless Mr. Wayne objects.

Mr. Wayne: It can be taken off from the book.

Witness: (A.) It is just a matter of getting it off that entry.

(Witness removes the sheet.)

Mr. Hull:

Q. I observe, Mr. Watson, from plaintiff's exhibit No. 74 that the total credit was placed to the credit of Mr. Frost of—under this letter of May 11th, of $29,306.00 and then cer-

tain payments were made to him reducing that to the sum of $16,306.00, is that correct?

A. That is correct.

Q. And that last figure, $16,306.00 represents the credit that still stands on the books of the corporation to Mr. Frost's account, is that correct?

A. That is correct.

Q. I observe that one of the cash payments or that a cash payment or repayment is then stated here of $3000.00 was made to Mr. Frost on May 10th, 1935. Do you know out of what monies that repayment was made?

A. No, I can't definitely say any particular sale or transaction. I don't know.

Q. What original records show that?

A. I did it, but I don't know.

Q. Then I take it you can't tell us out of what proceeds or proceeds of what stock repayments were made in May 15th and 16th—were made?

[fol. 157] A. No.

Q. But it was during that time, was it not, or approximately May 10 and 16th that Gibson, Jones sales were made?

A. Well, it would be impossible to make a payment if they had not been made.

Q. In the fall of 1935 a preliminary examination of the books of the corporation was made by Mr. Daniels, was it not?

A. Made by his firm.

Q. His firm? That is the firm of LeMaster and Canon or Daniels?

A. That is correct.

Q. Then subsequently or in the spring of 1936 a more complete audit was made by that same firm, was it not?

A. I wouldn't call it a complete audit, Mr. Hull. They combined the last examination they had started in their first audit.

Q. You cooperated with them in making that audit?

A. In every way I could.

Q. The books they made that audit from, so far as they made the audit, were the original records and books of the corporation?

A. That is correct.

Q. And all the information they obtained, was obtained from the original records of the operation?

A. I assume so. They were available to them.

Q. Did you have occasion to examine their audits?

A. I saw the first one. I never saw the second.

Q. You were in possession of them—the books were in [fol. 158] your custody at the time they were working on them.

A. Yes, they were.

Q. And you produced the various records as they requested?

A. That is correct.

Q. Now do you have these records in court that were submitted to LeMaster, Canon and Daniels for the purpose of their audit?

A. I don't have all of them. I have the major ones. There are some that deals with certificate numbers—with individual certificates issued that I don't have, but I do have the majority of cash receipts and vouchers control-ing the sales.

Q. At the time the original audit was made or original examination was made in the fall of '35 all the books were not in a completed condition at that time, were they?

A. No, they were not.

Q. And subsequently completed by yourself or under your direction?

A. Yes.

Q. Were they written completely or completed completely or what was done?

A. The situation briefly was this. The company had never had a book keeper. They started in in 1928 and had operated on a large and small scale intermittently but they had very few share holders and had not made any great amount of sales over a number of people. Primarily the major sale was the sale to the Bunker Hill Extension Mines and Miss Coffeen, former secretary, had maintained a very complete statement just in the way of bank stubs and canceled checks. [fol. 159] Q. Original memorandum?

A. Original memorandum, and from the original memorandum that was then available I assembled the general ledger as best I could.

Q. Did you keep a general account of treasury stock that was involved in the Boland option?

A. Seems to me I did, Mr. Hull. I don't recall off hand now.

Q. If you kept the account, do you have it here in all of the sales of treasury stock that were made subsequent to March 11, 1936?

A. After March 11, 1936?

Q. Yes.

Q. Do you have records of sales made from the treasury after that time?

A. Yes, I do.

Q. Was that record submitted to LeMaster, Canon and Daniels?

A. I think not. My recollection is that they came in at this time and prepared this second audit and then I believe we got into this stockholders meeting and one thing and another and I took the books up to Wallace and they came later to the former office of the corporation and they were told the books were in Wallace and if they wanted they could go up and see them and they never came.

Q. If they didn't see that record, I wonder if you could produce that book,—the sales from the treasury stock subsequent to March 11th, 1936.

A. Yes, I will. (Witness gets book.) That is the record we required——

[fol. 160] Q. You do have with you a complete record of all separate accounts?

A. This is the original record here and then we had also, in Wallace Bank & Trust Company for sale of stock up there and so we actually were making sales at that time on two accounts.

Q. Have you any records of sales made between August 15th—sales of treasury stock made between August 15, 1935 and March 11th, 1936?

A. I have.

Q. Will you produce that for us?

A. I don't have it abstracted in that form but it would be a matter of taking off the records here.

Q. The fact of the matter is there was just very few, if any sales, made between those dates of the treasury stock? See if it isn't a fact there were only one or two sales made?

A. What was the first date?

Q. August 15th, 1935.

A. Sale on the 15th—do you care to see that?

Q. You just stated the sale was made the 15th of August, 1935, that was a sale of 1,000 shares, I believe, was it not?

A. No, the sale was for—yes, that is correct, 1,000 shares.

Q. Now, from that time on down to March 11th, what sale—March 11, 1936, what sales, if any, were made from the treasury stock?

A. There were none made from the treasury items, so called.

[fol. 161] Q. Well then, when was the next sale of treasury stock made subsequent to March 11th, 1936.

A. I think the first one following March 11th was made on the 12th.

Q. 12th?

A. Yes.

Q. And just after that sales were made with considerable regularity from that time on?

A. I wouldn't say from that time on. I would say for a certain period.

Q. Were there any sales made March 13th—March 13th, 1936?

A. I don't see——

Q. Would they be recorded if there were any?

A. They would be.

Q. But there were sales for the balance of March, April and May, 1936?

A. That is correct.

Q. Sales of considerable volume, is that a fact, from the treasury?

A. That is correct.

Q. Now, isn't it a fact, Mr. Watson, that at the time the Boland agreement was entered into September 10th, 1934, that it covered all the treasury stock of the corporation with the exception of approximately 45,000 shares?

Mr. Wayne: Objected to as calling for a conclusion of the witness upon a matter he had no personal knowledge of and no connection with it. He wasn't working for the corporation at that time.

Mr. Hull:

Q. I will ask if you will refer to the books and state [fol. 162] whether or not that is a fact. He has the books here.

The Court: Objection overruled.

A. I believe that is a substantially correct statement.

Mr. Hull:

Q. A portion of that 45,000 shares that remained from the above or 1,300,000 shares was actually issued to Mr. Boland as a commission of some character, wasn't it?

A. I think so. I am not sure.

Q. Do you recall the amount that was issued to him out of that particular stock—out of the 45,000 shares?

A. (Witness looks at book.)

Q. About 15,000 shares, isnt's it?

A. My entry here I made December 3rd, 1934 I marked "50,000 shares Boland contends commission credit to the treasury stock optioned to Boland in like amount—50,000."

Q. But what stock was issued to Boland?

A. That was stock issued to Boland would be out of the stock originally covered by the Boland contract.

Q. Well, wasn't there also stock issued to Mr. Boland out of the 45,000 that remained after you ear marked the 1;300,000 shares covered by the Boland agreement?

A. My records indicate that Boland was issued two stock certificates, one for 10,000 shares on February 2nd, 1935 and a subsequent one for 5,000 shares on June 12th; and that both came out of the Boland—both came out of the stock that was ear marked originally from the Boland option.

Q. Out of the bulk of the 45,000 shares, that was left in the treasury after you ear marked the 300,000 covered by the Boland contract?

A. I think it stayed in the treasury. I think there were a few miscellaneous sales out of that amount. I can't [fol. 163] tell you off hand what that amounted to. That didn't amount to a great deal, but that just stayed in the treasury, is my recollection.

Q. Will you look in the ledger account that has been introduced in evidence here covering the Boland optioned stock 1,300,000 shares and tell us the balance or number of shares remaining in that account at the time you closed that account on your books?

A. At the time the account was closed?

Q. At the time you closed it, yes.

A. 805,150 shares.

Q. On what date did you close that account?

A. Closed March 12th, 1936.

Q. In other words, there was 805,150 shares of the original 1,300,000 shares covered by the Boland option remaining unsold and unissued on March 12th—on August 15th, 1935?

A. No, I beg your pardon. You asked me the date I closed the account, and I gave you the balance and now you are asking for a different date.

Q. Then I will state the question this way—on March 12, 1936 there remained unsold and unissued out of the 1,300,000 shares, the original option of Mr. Boland, 805,150 shares?

A. Just what do you mean by "unissued", Mr. Hull? I don't know whether I can say it was unissued or not.

Q. Not issued from the treasury account or that account. Of course we understand all this stock had originally been issued and came back in.

A. Yes, that is right. Two or three times.

[fol. 164] Q. On March 12th, 1936, out of the 1,300,000 shares covered by the Boland option there remained unsold and unissued from that account, 805,150 shares?

A. I believe that is a correct statement.

Q. Can you tell us, by referring to that account, how much of that stock remained unsold on June 30th, 1935?

A. June 30, 1935?

Q. Yes. (Witness looks at records.)

A. In the account proper there were 810,700 shares.

Q. That is of the date of June 30th?

A. Yes, of June 25th, you first asked me.

Q. Yes.

A. And in that Boland contingent commission account it may or may not be construed as part of that account there remained 35,000 shares.

Q. Referring now to the account called "Boland Contingent fund"—let me refresh your memory—isn't it a fact that originally there was an agreement that 50,000 shares was to be set aside in that fund by the company and another 50,000 shares set aside out of the 3,300,00- shares to go into that contingency fund?

Mr. Wayne: I submit that is incompetent. The records would be best evidence.

The Court: There is some record in the minutes about that.

Mr. Hull:

Q. The fact of the matter all of that stock was issued?

A. No, just 13,000 shares was.

Q. Now, I want to return again to March 15th, 1936. I think you stated from your records you found no evidence of sales of treasury stock on that date. We will take this [fol. 165] item, isn't it a fact certificate 3909 was issued to Wilson Miller that date, or have you the records of that date —out of the treasury?

Mr. Wayne: What was the date?

A. March 13th, 1936. 111 shares, Wilson Miller, certificate 3909.

A. Give me the date again, please.

Q. March 13th, 1936.

A. I don't have a subsidiary record of some of the certificates issued showing their origin. If you have any more information maybe I can find out something for you.

Q. Do you have your stock books with you here in town?

A. No, I don't.

Q. Have you any records here that would show whether on March 13, 1936, certificates 3919, 3914, and 3915 for 200 shares, which were issued from treasury stock to Herman Marquardt?

A. No, I have no way of getting at that this way. I would have to have the certificate numbers of the subsidiary I carry up there.

Q. Your treasury account doesn't show the debit of these items, that is, on that date, the treasury account you have with you?

A. I don't seem to find it, Mr. Hull, if it does.

Q. In other words, from the records you have with you, you can't state one way or the other as to that?

A. No, I can't.

Q. Do you have a record of your cash receipts for the period I am discussing, March 13th, 1936, from which you [fol. 166] could tell the amount received on that date from the sale of stock?

A. March 13th?

Q. Yes.

A. (Witness looks at records) Yes, sir.

Q. Were any sums received on that day?

A. I will have to refer to——

Q. I see.

A. (Witness goes to records—long pause) My records show there were receipts of stock sales 12th and 14th of March.

Q. What were the sales the 14th that you have found there?

A. $3,300.

Q. Even?

A. Even.

Q. You don't know what date that stock was sold?

A. Well, this is the situation—this stock was put in escrow in the Wallace Bank & Trust Company and was picked up by a broker in Wallace and that is the character of business and he took whatever portion he cared to. I presume the sale would be completed as he paid for it.

Q. This stock was placed in the Wallace Bank & Trust Company and picked up by this broker and was part of the treasury stock which had been originally covered by the Boland agreement?

Mr. Wayne: Object to this as being immaterial. Long subsequent, your Honor.

A. No, that is not so.

Mr. Wayne: Just a minute.

The Court: Overruled.

[fol. 167] A. My recollection is, however, that at the beginning when we first opened that account at the Wallace Bank & Trust Company the stock was composed of what we termed a "loan" the stock was subsequently—as that stock was sold I think some treasury stock was put in there. Now as to the deviation between the two, I can't tell you off hand without considerable work.

Q. The fact remains the treasury stock which would remain unsold, Mr. Boland's agreement was evidently exchanged for in the bank in Wallace and put in possession of the bank to sell?

A. That is correct.

Q. And they continued until practically all of that—that 800 odd thousand shares was sold?

A. Well, continued until—we have made no sales with the exception of one other and to that broker and that would be less out of the stock we have on hand now.

Q. How much have you on hand at the present time in the treasury in round figures, if you haven't it exactly?

A. Whatever that last statement Mr. Frost has shows.

Q. You mean the one introduced in evidence here?

A. No, one later than that. Small one.

Q. One under date of 1937?

A. Yes.

Q. Is that statement to date of October 31, 1937, that you refer to?

A. Yes, that is correct. We have had no sales since that date.

Q. At that time you showed approximately 154,961 shares I believe, in the treasury.

[fol. 168] A. That is correct. That is the right figure.

Q. Does that include any stock that had returned to the treasury by failing to pay assessments?

A. No, never has been any returned that way.

Q. The stock that has been—well—in other words this balance now—this balance of 154,961 represents all of the entire treasury stock of the corporation that is unissued at this time?

A. That is correct. By "unissued" that is, "unsold".

Q. Yes, unsold. Now, during that period immediately following March 13, 1936, you were secretary of the company at that time, of course?

A. March 13th, 1936?

Q. Yes.

A. No, I wasn't.

Q. Well, you became secretary in June of that year, did you not—that May?

A. In May.

Q. May, 1936? And you were handling the stock transfers then?

A. That is correct.

Q. And there were a large number of transfers being made at that time and immediately subsequent to that time from the treasury, were there not?

A. There were not many made subsequent to that time. You mean March or May?

Q. I am speaking now of May.

A. Of May?

Q. Yes. I thought you knew generally from your own knowledge.

[fol. 169] Mr. Wayne: May my objection go to all this line of testimony for the reason that is is long subsequent

to the letter of April 23rd, 1935 and plaintiff could have no possible interest in what defendant did with its treasury stock after that time or whether it disposed of it legally or illegally or what price they got for it.

Mr. Hull: It is immediately subsequent to service of notice or notice of revocation or cancellation of March 31, 1936 and that notice make no reference to a letter of April 23rd. The question was whether or not there were any large number of transfers made from treasury stock immediately after you became secretary in May, 1936?

A. By transfers, you mean sales?

Q. Yes, sales from treasury stock.

A. As a matter of fact I don't think there was a single one.

Q. Is that so?

A. During the month of May.

Q. During the month of May?

A. During the month of May.

Q. This Wallace broker you mentioned that was picking up stock that was the broker in the Peneluna Company or Mr. Henry Kingsbury doing business in the name of Peneluna Investment Company?

A. He was individually.

Q. Can you tell us what price he was paying for that stock in March, 1936?

A. March of 1936?

Q. Yes.

A. We have a voucher on that. (Looks at record.) Well, [fol. 170] on March 12th and 14th he picked up stock on these two days and he paid 22¢ a share for it.

Q. And the stock was assumed upon sliding scale, was it not, the highest, after the pick ups, were put at a higher rate than that?

A. That is correct. I believe some stock later—pretty stiff—went at a pretty stiff price.

Q. By pretty stiff price, what do you mean?

A. I don't know. I would have to look it up.

Q. I would like the scale of prices if you have it.

A. On April 25th, 1936, there was put in the Wallace Bank and Trust Company 30,000 shares of stock to be sold at 25¢ a share. Is this what you are getting at, Mr. Hull?

Q. Yes, give us the entire scale of prices?

The Court: We will recess until 1:30. Look that up in the mean-time.

(Following the noon recess Mr. Watson resumes the witness stand.)

Mr. Hull:

Q. I think at recess, Mr. Watson, I had just asked you to give us the schedule of prices that the treasury stock that was placed in the Wallace Bank and Trust Company was taken up by the Peneluna Company.

A. This is a carbon copy of a letter written to the Wallace Bank & Trust Company on April 29th, 1936.

Mr. Wayne: This goes all subject to my general objection.

Mr. Hull:

Q. Might I see that letter. (Hands to Mr. Hull.) You are using that letter merely as a memorandum of the information that I requested, is that it?

A. This is part of the original records of the company.

[fol. 171] Q. That letter states those prices that I have requested of you?

A. Yes, substantiates the entries I have made in my books.

Q. Will you state what those prices were?

A. 50,000 shares 25¢ per share until June 15th, 1936. 25,000 shares 30¢ per share——

Q. Not quite so fast.

A. 30¢——

Q. 30¢, until June 15, 1936.

A. 25,000 shares, 40¢ per share until June 15, 1936. 160,000 shares at $1.00 per share until August 15, 1936.

Q. On what date was that stock deposited in the Wallace Bank & Trust Company under those terms?

A. I can't give you the date it was deposited but apparently mailed April 29th, 1936.

Q. All that stock was sold, taken up and paid for, was it not?

A. No.

Q. But subsequently sold under some other arrangement?

A. Part of it, yes.

Q. Well, you testified this morning that there was only 154,000 shares now left in the treasury.

A. That is correct.

Q. And in April, 1936 there was substantially 800,000 shares in the treasury?

A. I don't think I did.

Q. Perhaps not on that date but as to March 11th, 1936 you testified there was some 800,000 shares.

[fol. 172] A. No, I don't believe so.

Q. However, a considerable portion of this stock that you have now referred to as being deposited in the Wallace Bank & Trust Company on April 29th, 1936 was sold, taken up and paid for?

A. I believe then, between this figure of 260,000 plus the odd lot sold out of 5,000 less whatever the statement shows now, 155——

Q. Mr. Watson, this stock amounting to 260,000 shares, that is the amount, isn't it?

A. That is correct.

Q. The 260,000 shares that were placed in escrow in the Wallace Bank & Trust Company in April, 1936 didn't represent all the unsold treasury stock of the company at that time, did it?

A. Not all of it, no, but almost.

Q. Almost all of it at that time?

A. Yes.

Q. Well now, you testified this morning that the balance of unsold treasury stock on March 12th, 1936 was 805,150 shares. That would be, say the balance—the figure you use to balance out the Frost account which you identified this morning?

A. That is correct. That is what I told you.

Q. That was under date of March 12th, 1936?

A. Yes.

Q. Now then, do I understand between March 12, 1936 and April 29, 1936, that being the date upon which you deposited the 260,000 in the Wallace Bank & Trust Company, that you had sold and disposed of the difference be-

[fol. 173] tween 260,000 shares and 805,000 shares of treasury stock?

A. I beg your pardon. I think there was more than 805,000. I think, when I testified this morning, there was a balance of treasury ear marked as "Boland Contingent bonus" or "option"—not option—but bonus.

Q. In other words that would have to be added to 805,000 to get the exact amount of treasury stock unsold March 12th, 1936?

A. As ear marked in the Boland option account, yes.

Q. Then I will frame my question this way—do I understand between March 12, 1936 and April 29th, 1936 you had disposed of all treasury stock except 260,000 shares that you placed in the Wallace Bank & Trust Company or substantially all? I don't want to know the first share.

A. (Witness looks at records.) No, that isn't so.

Q. Well then, how much was sold between those dates in round figures? That is, between the date of March 11th, 1936 and April 29th, 1936, just roughly?

Mr. Wayne: May I renew my objection to this. This is long subsequent to any transaction involved here. It is therefore immaterial. He is speaking now of a period from March to April 1936 and not 1935.

The Court: I will overrule the objection. He may answer.

A. What was the first date in March?

Mr. Hull: (Q) March 11th, 1936 or March 12th, the date you balanced the account out.

A. Give me the last date in April, please.

Q. April 29th, 1936 that being the date in which you deposited 260,000 shares in the Wallace Bank & Trust Company.

A. Roughly 165,000 shares.

[fol. 174] Q. Perhaps I misunderstood you, Mr. Watson, but I thought you said 260,000 shares that was placed in the Wallace Bank & Trust Company on April 29, 1936 represented substantially all the unsold treasury stock on that day.

A. That is correct.

Q. Well, then my mathematics must be in error here some place because you had testified on March 12, 1936 there was 805,000 shares remaining in the treasury which had been ear marked under the Boland Contract and between that date and April 29th, 1936 you only sold 165,000 shares. That undoubtedly would leave considerable more than 260,000 shares or some 145——

A. Well, there was 260,000 shares replaced, that is to say, in the summer of 1935, a number of stockholders sold part of the stock and that stock was loaned sometime in March I believe, and that is the date that stock was replaced share for share in the treasury.

Q. This stock was replaced out of 805,000 shares?

A. Oh, yes.

Q. And that would account for the discrepancy in our figures?

A. Practically so and I was noticing here this morning I believe I put a foot note down here—I was reading a foot note instead of the complete transaction for the month of March. You asked at that time about a sale made on the 11th of March——

Q. Yes, or the 12th—11th, I believe.

A. Would you care for me to correct my testimony?

Q. Yes, if you were in error you may correct your testimony.

[fol. 175] A. I see—I beg your pardon. It was loan stock that was sold. Not treasury stock.

Mr. Hull: I think that is all, Mr. Watson.

Examination.

Mr. Wayne:

Q. Mr. Watson, this exhibit No. 72 is a page from the Coeur d'Alene Mines Corporation ledger, is it not?

A. It is.

Q. And it is a record of stock rather than money transaction?

A. It is. It is in shares, $1.00 par.

Q. And it starts with a debit, does it not, of $1,300,000 shares under this Boland option?

A. That is correct.

Q. And then as sales were made and deliveries made under that option there were credits of stock against this 1,300,000?

A. They had this replaced stock and as the stock was either picked up by Mr. Frost or whatever the case might be the account was reduced by the number of shares that had been so delivered.

Q. Now, will you state whether or not that includes among the credits the 80,000 shares of stock sold by Gibson?

A. It does.

Q. And the 20,000 shares sold by J. E. Jones?

A. Yes, it does.

Q. How about the stock sold to or by Starmont?

A. I don't know anything about that Starmont sale.

Q. You don't know whether it is included in there or not?

A. I didn't—if it occured within a period of September 1934 to some time in July on, or that year, 1935, it would be [fol. 176] included in those figures, but I can't recognize the item just by "Starmont".

Q. What is the date of the last credit on that account?

A. You mean cash credit on this journal entry cleaning the account out?

Q. Cleaning the account out.

A. The last credit on the account is March 12, 1936.

Q. And that is the entry showing the balance left unissued of the original 1,300,000 shares, is it?

A. That is correct.

Q. And that figure is 805,150 shares?

A. That is correct.

The Court: What is that again?

Mr. Wayne: And that balance is 805,150 shares.

The Court: Alright.

Copy of minutes of meeting of Board of Directors of Coeur d'Alene Mines Corp. Nov. 12, 1934, marked as Defendant's Exhibit No. 75 for identification.

Mr. Wayne:

Q. Mr. Watson, I show you defendant's exhibit No. 75,—will you state what that is?

A. Minutes of meeting of Board of Directors of Coeur d'Alene Mines Corporation.

Q. Held on what date?

A. Held on November 12, 1934.

Q. Will you state whether or not that is not the minutes of a meeting at which some action was taken in regard to the [fol. 177] claim of Boland for commission?

A. It is.

Q. And what was the amount of stock that then remained in the treasury in addition to this 1,300,000 shares? Can you tell from the minutes?

A. According to the minutes there was 49,950, if I read this right.

Mr. Wayne: I offer exhibit No. 75 and ask leave to substitute a copy. (Hands to counsel.)

Mr. Hull: We object to defendant's exhibit 75 on the ground it is immaterial. Second, it is self-serving and third, it is not binding on this defendant.

Mr. Wayne: It is offered for explaining the Boland transaction.

The Court: Objection overruled. It will be admitted.

Defendant's Exhibit No. 75 admitted in evidence.

Mr. Wayne:

—. Mr. Watson, do you know whether any of the stock which was turned over to Boland as a commission came out of this 1,300,000 shares?

A. It did.

Q. It did?

A. [illegible]id.

Q. [illegible] much of it?

A. Whatever was issued. I think 15,000 shares.

Q. Now, showing you again the letter of April 29th, 1936 to the Wallace Bank & Trust Company will you state whether or not all the stock mentioned in that letter was taken up and paid for at the prices therein set forth?

A. It was not.

[fol. 178] Mr. Hull: He already testified to that.

Mr. Wayne:

Q. How much of it was? Will you compute——

(Witness goes to table and figures.)

A. In November 23, 1936, 5,000 shares of the stock was issued to Fred Fudge to apply on a bonus due him at the rate of 25¢ per share. On October 30th, 1000 shares sold at 9½ or rather 9¼ gross proceeds—net proceeds being $905.00——

Mr. Nuzum: Is that 1000 or 2000——

Witness: I beg your pardon,—$95.00—that was 9½. On October 16th—no, October 15th, 5,000 shares sold, net proceeds were $500.00. September of 1936, 19,500 shares were sold, net proceeds $1,950.00 and on the 24th of September, 15,000 shares sold, net proceeds of which were $1500.00. Other than this sale, I have a statement of one sale to Dr. Herbert Mowry, 5000 shares at 35¢ a share. Other than that sale and this we have gotten from the balance of the stock in the Wallace Bank & Trust Company was taken up at either 22¢ or 25¢.

Q. Mr. Watson, in this letter you will note that the first 50,000 shares was at 25¢ a share. Was that taken up at that price?

A. It is hard to identify specific blocks of stock put in the Wallace Bank & Trust Company prior to this time we had additional shares in this escrow account and the records don't indicate just the sales made or which particular block was made out.

Q. Well, particularly the last item of the 160,000 shares at $1.00 a share—was any part of that?

A. No.

[fol. 179] Q. Was any part of it taken up at 40¢ a share?

A. No.

Q. Or 30¢?

A. No.

Q. Either at a price of 25¢ or less?

A. Yes, with the exception of 5000 share item that I have mentioned sold to Dr. Herbert Mowry.

Q. What became of the remainder of that stock? Was it taken down from the bank?

A. No, it is still there.

Q. Still there?

The Court: How much is in the bank now?

A. Shares—there is in the bank now. I think approximately 150,000 shares.

The Court: And what stock has the company in the treasury in addition to what is in the bank?

A. There is unissued on the books—I think there is a small amount of about 4900 or 3900 shares.

Mr. Wayne:

Q. All these stock transactions in relation to the stock in the Wallace Bank & Trust Company were the entire proceeds of the sale paid to the company?

A. Yes.

Q. The sums which you have given?

A. Yes, that was both gross and net price.

Mr. Wayne: That is all.

Mr. Hull: Just a minute——

Recross-examination (under statute).

Mr. Hull:

Q. You spoke of some loan stock. Just a few that had—a few of the larger stockholders loaned about 207,000 shares [fol. 180] to the corporation?

A. Approximately that, I believe.

Q. Subsequently they were repaid—that stock was sold and subsequently the corporation reimbursed to them or reissued a similar amount of stock?

A. Share for share.

Q. That stock, of course, that was issued to them was issued out of treasury stock?

A. That is correct.

Q. And out of the portion of treasury stock that had originally been covered by the Boland option?

A. Yes, I believe that would be correct.

Mr. Hull: I think that is all.

Re-examination.

Mr. Wayne:

Q. That was among part of it with which the company paid and made payment of $50,000.00 on Mineral Point bonds, is that right?

A. That is correct.

Mr. Wayne: That is all

(Witness excused.)

E. C. Daniels, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Mr. Hull:

Q. State your name?

A. E. C. Daniels.

Q. Residence and occupation?

A. Spokane, Washington, certified public account-, mem- [fol. 181] ber of the firm of LeMaster and Daniels.

Q. Mr. Daniels, did you have occasion to examine and make an examination of the books and records of the Coeur d'Alene Mines Corporation in the summer or fall of 1935?

A. Yes, I did. I made an examination of part of the records in the fall of 1935 and in the spring of 1936.

Q. Well, referring to the first time, the fall of 1935, did the corporation at that time have complete records?

A. At the time we started this work the records of the—the books of the corporation were just being written up from the original memorandum.

Q. And you didn't at that time, make a detailed or complete examination, I take it?

A. I didn't make a complete audit or examination. I made a detailed examination of certain phases, particularly the capital stock records.

Q. Now then, in the spring of 1936, what was the condition of the books at that time? Had they been written up and completed?

A. Yes, written up and completed at that time.

Q. And did you make an examination and audit at that time?

A. Yes, I made an examination of, I believe the sales and capital stock—capital stock records and possibly a few other items at that time.

Q. You didn't make a general audit of all the company affairs?

A. At no time did I make a general audit.

Q. At the time you made this examination of the stock records and treasury stock account in April or in the spring [fol. 182] of 1936 what books were made available to you as you now recall?

A. As I recall it, all the books that were in the office. To be specific, the cash book, general ledger and capital stock records which constitutes the certificate stubs and I am not sure whether they had a transfer journal or not.

Q. But Mr. Watson was there at the time you were doing this work?

A. Yes.

Q. And it is a fact, isn't it, he made available for you whatever records you call for in order to get the information you were seeking?

A. Yes, he furnished any records I asked for that were available.

Q. Now, did you, at that time—well, first, after you made your examination did you make any compilation of your findings of the detail that you had taken from the books?

A. Yes, I did.

Q. I will ask you to state whether or not you made or determined and made a record of—that is, a transcript of the stock—the treasury stock sold during the period or during the month of April and May, of 1935?

A. Yes. Such a record was made either by me or a member of the staff under my direction and supervision.

Q. And you made a compilation of that, did you not?

A. I did.

Q. Do you have that with you?

A. Yes, I have a copy of that before me.

Q. I am going to ask you to examine that—first, is this compilation that you have made now a complete compila-
[fol. 183] tion of the stock sold from the treasury, that is, —I think you designated the optioned treasury stock of the company in the months of May—April and May, 1935.

A. It is a complete transcript of the transactions for that account as shown by the company records at that time.

Q. When you refer to the option treasury stock account, what particular account do you have in mind?

A. I have referred to an account in which the 1,300,000 shares of stock were set aside and marked as "optioned". I believe marked "Boland option".

Q. Now then, consulting your compilation of the transactions during the months of April and May, will you tell us first the number of shares sold or transferred in these two months of that optioned treasury stock?

A. In April, 87,300 shares and in May 170,500 shares.

Mr. Potts: What was it in April?

Witness: (A.) 87,300.

Mr. Potts: 87,300?

Mr. Hull: What is the total of that?

A. Total of 257,800 for the two months.

Q. Now then, does that include the item of 87,000 sold to E. J. Gibson company or can you tell?

A. Yes, that includes the 86,000 shares for which payment was received from E. J. Gibson Company according to the company books.

Q. On what date do you have that payment?

A. Date of payment was May 9th, 1935.

Q. And the amount of payment?

A. $22,000.00.

Q. Now, does that—does your total 257,000 also include [fol. 184] 20,000 sold to J. E. Jones or through the J. E. Jones corporation or concern?

A. Yes, it does—20,000 shares.

Q. On what date was that sale made, if your records show?

A. The certificates were issued on May 13th and the cash payment was recorded as received May 14th, 1935.

Q. What was the amount of that cash payment?

A. $3000.00.

Q. Does your total—what did you say the amount was that you received from the J. E. Jones Company for the 20,000 shares?

A. $3000.00.

Q. $3000.00?

Mr. Nuzum: For 20,000?

Mr. Hull:

Q. Mr. Daniels, will you examine your records again and see if that payment of $3000.00 covers the entire 20,000 or whether or not there was some subsequent sums received from J. E. Jones with reference to that same 20,000 shares?

A. (Witness looks at records:) According to my transcript it is in full payment of the 20,000.

Q. Well, going back now to the total of 257,000 shares, that were issued in April and May of that year, 1935, does your total include the block of 10,000 issued to A. C. Frost & Company?

A. Yes, included in the April issue is 10,000 shares issued to A. C. Frost & Company.

Q. Well, then, deducted from your total of 250,000 shares, the three items of 80,000, 20,000 and 10,000 how much—— [fol. 185] A. 147,800 shares.

Q. You, of course, have no way of knowing to whom that 147,000 shares was sold, have you Mr. Daniels?

A. No, I haven't the names in which certificates were issued. The names were recorded in the books from whom payments were received, otherwise I don't know who made the sale.

Q. I now direct your attention to the date of March 13, 1936 and I will ask you to state if you made a compilation

of the stock transfer from the treasury account of the corporation from March 13th, 1936 to and including April 14th, 1936?

Mr. Wayne: Objected——
Witness: (A.) Yes, I did.
Mr. Wayne: Object to that as immaterial.
The Court: Overruled.

Mr. Hull:

Q. Will you state the number of shares transferred from the treasury stock of the corporation between those dates?
A. Between March 13th, 1936 and April 14th, 1936 111,374 shares.
Q. And that last date of April 14th, 1936 was the date upon which you concluded your audit, was it not?
A. That is correct.
Q. Covering a period from August 15th, 1935 to March 13th, 1936 will you state how many shares were issued out of the treasury?

Mr. Wayne: A. Same objection to this.
The Court: I don't see—why don't you take the total time, Mr. Hull?
[fol. 186] Mr. Hull: Pardon?
The Court: Q. If you don't find the number of shares issued why don't you take the total time of his audit?
Mr. Hull: I was interested in this particular period, August 15th, 1936 to March 13th, 1936 which covers a period in which they contend they refused to issue stock.
The Court: They haven't issued any since, have they?
Mr. Hull: Oh, yes, after March 13th.
The Court: To the plaintiff?
Mr. Hull: Not to plaintiff, no. To the public generally.

Witness: (A.) August 15th, 1935 to March 13th, 1936 I only have one sale of stock from the treasury comprising 400 shares.

Mr. Hull:

Q. Mr. Daniels, did you make an analysis of the account of the credit—first, did you find a credit set up on the books of this corporation in favor of A. C. Frost & Company?
A. I did.
Q. And in the account—in what amount?

A. May I get my memorandum of that?

Q. Yes.

A. (Witness gets papers:) Found a credit in the amount of $16,306.00.

Q. Did you make an examination of the items comprising that credit?

A. I did.

Q. Can you give them to us?

A. I find a total credit of $29,306.00 representing the excess of the sale price of optioned treasury stock over 10¢ a share. I found three cash payments and the account May 10, $3000.00, May 15th, $6500.00 and May 16th, $3500.00 a [fol. 187] total of $13,000.00, reducing the credit balance to $16,306.00.

Q. Over what period was that credit set up if your records show?

A. It was from January, 1935 to August 15th, 1935.

Q. And what is the first item and the date of it and the amount?

A. The first item is a sale of January 30, 1935 of 1000 shares of stock for $200.00, $100.00 of which was credited to the account of A. C. Frost & Company.

Q. And it is made up of a large number of items from that time on?

A. From that time on there are many items, yes.

Q. Did the records show or do your records show the amount—the number of shares—the total number of shares sold to make up that credit of $29,306.00?

A. Yes, they do. The total number of shares from which that credit is derived was 279,850.

Q. Mr. Frost was credited with only in excess of 10¢ a share on that?

A. He was.

Q. You testified that during the months of April May, 1935, 257,000 shares were issued. I now ask you if the 279,850 shares from which this credit was applied to be in favor of Mr. Frost included the 257,000?

A. Included 247,800, there being in the 257,800 10,000 shares taken up by A. C. Frost & Company and my figure of 279,850 shares is the stock sold to others and A. C. Frost and Company or W. J. Boland.

Q. Did you make an examination to determine how the [fol. 188] $22,000.00 received from the sale of 80,000 shares to Gibson & Company was disbursed by the corporation?

A. Not specifically. I might be able to determine from my records.

The Court: What was paid or taken out of the shares?

A. $1000.00 at 10¢ a share. All stock that went to Mr. Boland was paid for at 10¢.

The Court: Was that paid in cash or was it a charge account?

A. It is my recollection that it was all cash. My records show it all paid in cash.

The Court: What was the date?

A. The dates—let's see—(Looks at records).

The Court: Are you familiar with the option?

A. Yes, I read it at the time. I have some memorandum of it.

The Court: Well, does the date of the sale of 10,000 shares correspond with the date as shown in the option when payment should be made?

A. I can't say, your Honor, without looking up the agreement again. I can give you the date of all these payments if you care to have them. There are quite a number.

The Court: No.

Mr. Hull:

Q. Mr. Daniels, referring again to the 279,850 shares out of which the credit set up to A. C. Frost & Company was derived do the records show whether or not that stock was paid for?

(Witness goes to table.)

Q. I mean, does it show the company received this 10¢ a share for that stock?

[fol. 189] A. Just a second, I will tell you. I have it here (looks at records). All was received and deposited in the company's bank account with the exception of $345.00 which was charged to the account of Nuzum and Nuzum.

Q. I want to return to this item of J. E. Jones which you have related in your testimony to the effect that consideration received by the corporation was $3000.00 for 20,000 shares. I will ask you to examine sheet eight of Exhibit "A" of your audit and state what that disclosed with respect to the amount received for the 20,000 shares?

A. Sheet eight——

Q. Of Exhibit "A".

A. That seems to be a matter of 20,500 shares in June of 1935.

Q. Will you check the records on that?

A. Alright. (Witness looks at records on table.) I have the very record on that transaction.

Q. Will you state what that record discloses?

A. I have a transcript of the journal entry in connection with it which charges the bank with $3000.00 deposit. Stock discount with 18,000 credits A. C. Frost & Company with $1000.00 and credits treasury stock, Frost option $20,000.00.

Q. 20,000 shares you mean?

A. $20,000.00, with an explanation as follows: "to local sale of 20,000 shares of treasury stock proceeds of which were received by"—marked, "N. & N." and $3,000.00 remitted to corporation". Attached to that voucher were two letters from J. E. Jones brokerage corporation from which I had some notations made. Would you like them?

[fol. 190] Q. If they give any explanation of the distribution of that money, yes.

Mr. Wayne: Objected to as not best evidence.

The Court: Overruled.

Mr. Hull:

Q. Those were letters that were in the files of the Coeur d'Alene Mines Corporation?

A. Yes, letters attached to the files.

Q. And you were auditing the vouchers and so on?

A. Yes. One letter dated May 7th, 1935 said—"Enclosed find a check for $2000.00 as payment for 10,000 shares of Coeur d'Alene Mines Corporation stock purchased for our account today". Another letter dated May 8, 1935 said "enclosed find check for $2000.00 as payment for 10,000 shares of Coeur d'Alene Mines Corporation stock purchased for our account today". That appeared to be all that pertained to this 20,000 share transaction.

Q. That is the transaction then that was concluded on the 14th day of May, 1935?

A. That appears to be it, yes. That is the only sale to J. E. Jones brokerage company.

Q. The total amount remitted to J. E. Jones then is $4000.00?

A. Apparently $4000.00 according to the letters.

Q. How much stock, if any, was sold to J. E. Jones Company in June of 1935?

A. In June they paid for 20,500 (20,500) shares from this optioned treasury stock.

Q. Optioned treasury stock? How much was paid for that?

A. $2275.00.

[fol. 191] Q. And any credit passing to Mr. Frost?

A. $225.00.

Q. That made a total then of how much?

A. Well, $2275.00 was the total cash received by the corporation.

Q. That is gross? $225.00 to be deducted from that?

A. $225.00 to be deducted leaving it 10¢ a share $2050.00.

Mr. Hull: That is all.

Cross-examination.

Mr. Wayne:

Q. Mr. Daniels, the court asked you a question in regard to the date of payment of 1000.00 for the 10,000 shares of stock issued in April 1935 to A. C. Frost & Company. Can you give me that date?

A. That date was April 26th, 1935.

Q. Did you find any payment directed to the defendant corporation, that is, to the Coeur d'Alene Mines Corporation from A. C. Frost & Company after that date?

A. I will look and see. (Looks at papers.) No, No, I find none after that date.

Q. Now, until April 1935, in addition to that 10,000 shares there were 77,300 shares sold out of the treasury, was there not?

A. That is right—77,300 from the optioned treasury stock.

Q. Can you tell me what amount was received by the Coeur d'Alene Mines Corporation for that stock?

A. Yes, $12,696.00.

Q. Twelve thousand——

[fol. 192] A. —six hundred ninety six dollars.

Q. And will you state whether or not any amount of that was set up as a credit to A. C. Frost & Company?

A. Of that amount the account of A. C. Frost & Company was credited with $4966.00.

Q. In the month of May, you say 170,500 was transferred out of the treasury?

A. Yes, 170,500 from optioned treasury stock.

Q. And included in that amount was 80,000 to E. J. Gibson Company, was there not?

A. Yes.

Q. And 20,000 to J. E. Jones?

A. That is correct.

Q. Now, can you tell me the total amount paid in to the treasury of the Coeur d'Alene Mines Corporation for that 170,500 shares?

A. I have it in just a minute—(looks at records) $36,830.00.

Q. And was any of that sum set up as a credit to A. C. Frost & Company?

A. $19,780 (19,780) was credited to A. C. Frost & Company.

Q. Now, speaking particularly of the 80,000 sale to Gibson, what amount of money did the company receive for that stock?

A. The total amount received was $22,000.00.

Q. And was any sum set up as a credit to A. C. Frost & Company out of that sum?

A. Yes, $14,000.00. That is included in that total figure I gave you.

Q. Yes, included in the $19,780.00.

[fol. 193] A. Yes.

Q. $14,000 even is it?

A. $14,000 even, yes.

Q. Now, of the Jones 20,000, can you tell me the total receipts by the company—the total amount received by the company for that stock?

A. $3000.00.

Q. And was any of that sum set up as a credit to A. C. Frost & Company?

A. $1000.00.

Q. And that too, was included in the $19,780.00?

A. That is correct.

Q. And both of those figures are included in the item of $29,360.00 and of course a credit set up to A. C. Frost & Company upon the books of the defendant?

A. They are.

Q. Now, what are those credits as disclosed from your audit 3000—6500 and 3500?

A. You mean charges to his account?

Q. Yes, I should have said charges.

A. Issued by checks to the company—issued by checks of the company.

Q. And sometimes——

A. Sometimes these were not cashed and issued to A. C. Frost & Company. I would have to check my papers on that.

Q. Well, what did you find to—have you any record of that independent of the books of the company?

A. I believe I have.

Q. Will look to find out?

A. I will look through my papers.

[fol. 194] The Court: We will take a short recess.

(Following recess the witness again resumes the stand.)

Mr. Wayne:

Q. Did you find this item, Mr. Daniels?

A. I find—I didn't find the record showing whether the checks were issued to A. C. — & Company or not. I examined the books of the company to refresh my memory and I find there an entry as paid to A. C. Frost & Company.

Q. Those three payments aggregating $13,000.00 are deducted on the books from the $29,306.00?

A. They are.

Q. And the balance of $16,306.00 as shown is credited to A. C. Frost & Company on the books?

A. It was at the time we made our examination.

Q. That was April 14th (14th), 1936?

A. Yes.

Q. This item of $16,306.00 represents an excess over 10¢ of the sale price of 247,800 shares of treasury stock, would it not?

A. It is more than that. It is 279,850.

Q. 279,850.

A. That 247,800 is somewhere in April and May.

Q. That is correct. But on here the 247,800 is included in the 279,850?

A. It is.

Q. That is what he refers to now, isn't it, the difference between 10¢ a share and whatever the sale price was?

A. Whatever amount was received by the company.

Q. Yes, out of the amount received by the company. [fol. 195] You found the stock records and other books of the company in a good and fair condition, did you?

A. Oh, yes. I found them very satisfactory. Just one thing, I couldn't tie up the payments sometimes to the specific list of stock that Mr. Watson was writing from the books—was writing from the memorandum and I am satisfied he couldn't either, with the material he had, but he did a very good job.

Q. You found no discrepancies?

A. I didn't notice any discrepancies in the books, no.

Mr. Wayne: That is all.

Redirect Examination.

Mr. Hull:

Q. Mr. Daniels, in making your audit particularly of stock sales to J. E. Jones, Brokerage, of course you had only available to you the record of monies actually paid to the corporation?

A. That is true and of which I made note in my *note in my* report to Mr. Frost, with the exception of very few instances we were not able to verify actual sales of part of the stock.

Q. And if per chance proceeds of this sale, Jones sales had been paid to Nuzum & Nuzum and they had disbursed them, on your audit you only found items paid to the corporation?

Mr. Wayne: Objected to as argumentative.

A. Yes.

The Court: It may stand.

The Witness: That is correct.

[fol. 196] Mr. Hull: That is all.

Re-cross Examination.

Mr. Wayne:

Q. Mr. Daniels, you mentioned in your testimony the data that you had seen in relation to the sale of 20,000 shares to J. E. Jones. That transaction and remittance was to Nuzum, was it not?

A. Yes. Those letters were to R. W. Nuzum.

Q. Yet you found them among the company files and found the credit of $3000.00 to the company, did you not?

A. Yes, at the time these letters—I believe they were the original letters or copies were attached to a certain voucher in the company's files.

Mr. Wayne: That is all.

Mr. Hull: I think that is all.

(Witness excused.)

OFFERS IN EVIDENCE

Mr. Potts: Pursuant to the terms of the stipulation of facts on file in the case and introduced in evidence, we offer in evidence the decision of the Supreme Court of Washington rendered on March 9th, 1912 in the case of State ex rel, Preston Mill Co. v. Howell reported on pages 861 to 863 inclusive in Volume 121 of Pacific Reporter and we offer these pages in evidence with the privilege of substituting a copy in place of the volume.

Mr. Wayne: May I say this before—I think it is all immaterial. It is covered by stipulation. I know that counsel are trying to obviate any question that might be raised in the decisions of our Supreme Court in Mason v. Bullocks, but I don't think that case goes so far as this question. Be-
[fol. 197] fore you can use this case, particularly in light of the stipulation such as we have entered into here and you have to actually have this decision in evidence and it would encumber the record with that as an exhibit. I am perfectly willing to agree with counsel that it may be considered that every case in which, I think there are fourteen, mentioned by date and citation to the Pacific or Pacific second, may be considered as part of the evidence in this case without introducing either the original report or a copy.

The Court: Is that satisfactory?

Mr. Potts: I am not willing to enter into such a stipulation because we feel it will not affect us in the light of the decision of the Supreme Court in the case of Mason v. Bullocks in which the parties did enter into a similar situation under the laws of the State of Washington. The Supreme Court in our state refuses to recognize the laws of that state.

Mr. Wayne: That was a different stipulation, Mr. Potts. It was a stipulation that the court might go out and hunt up those laws and the decisions and use what they wanted to and construe them.

(Further argument between counsel is herewith omitted.)

The Court: Objection will be overruled. You may proceed. I take it that you will substitute copies?

Mr. Potts: I wish to offer now prepared copies of each decision in place of the printed decision in the reporter.

The Court: You are giving the whole decision, I presume?

Mr. Potts: The entire decision. Of course I realize nobody is going to read these decisions from the exhibits. If your Honor will read them, you will read them from the reports and so will the Supreme Court.

The Court: Yes, there might be some doubt as to be-
[fol. 198] ing correct copies.

Decision, State ex rel. Preston Mill Co. v. Howell, Supreme Court of Washington, Marked as Plaintiff's Exhibit No. 76 for Identification.

Mr. Wayne: I didn't understand they were certified copies.

Mr. Potts: No, if they were certified copies we could offer them without stipulation. That is the purpose of the stipulation.

We now offer in evidence the decision of the Supreme Court of Washington in the case of Jones v. Francis, et al. reported in pages 307 to 310 inclusive in volume 127 of the Pacivic Reporter and ask leave to substitute a copy.

Decision, Jones v. Francis et al., Supreme Court of Washington, Marked as Plaintiff's Exhibit No. 77 for Identification.

Mr. Potts: We offer in evidence the decision of the Supreme Court of Washington, rendered March 28th, 1913, in the case of William A. Eastman & Co. v. Watson, et ux., reported at pages 1144 and 1145 in volume 130 of the Pacific Reporter and ask leave to substitute a copy.

Decision, William A. Eastman & Co. v. Watson, et ux., Supreme Court of Washington, Marked as Plaintiff's Exhibit No. 78 for Identification.

[fol. 199] Mr. Potts: We offer in evidence the decision of the Supreme Court of Washington in the case of State

Ex Rel., New Arlington Hotel Co., et al., v. Hinkle, reported on page 4 of volume 197 of Pacific Reporter and ask leave to substitute a copy.

Decision, State Ex Rel., New Arlington Hotel Co., et al. v. Hinkle, Supreme Court of Washington, marked as Plaintiff's Exhibit No. 79 for identification.

Mr. Potts: We offer in evidence the decision of the Supreme Court of Washington in the case of Patterson v. Ford, et ux. reported on pages 1006 to 1008 inclusive in volume 8 of the Pacific Reporter, second series, and ask leave to substitute a copy.

Decision, Patterson v. Ford et ux., of Supreme Court of Washington, marked as Plaintiff's Exhibit No. 80 for Identification.

Mr. Potts: We offer in evidence the decision of the Supreme Court of the State of Washington in the case of Moore v. Los Lugos Gold Mines, et al. reported at pages 253 to 265 inclusive in volume 21 of Pacific Reporter, second series and ask leave to substitute a copy.

Decision, Moore v. Los Lugos Gold Mines, et al., of Supreme Court of Washington, marked as Plaintiff's Exhibit No. 81 for identification.

[fol. 200] The Court: They will be admitted.

Plaintiff's Exhibits No. 76 to 81 admitted in evidence.

Mr. Potts: Plaintiff rests.

Mr. Wayne: May we take an adjournment now until tomorrow morning.

The Court: There is no objection on the court's part.

Mr. Potts: We don't object.

February 11th, 1938, 9:30 A. M.

Mr. Wayne: If your Honor please, I want to offer certain decisions that are covered by the stipulation and ask leave to substitute copies later. The first is a decision of the Supreme Court of the State of Washington case of Grant v. Monterey Gold Mining Co., et al. decided August 30, 1916 and reported in volume 159, Pacific Reporter at page 895 and the reporter will assign a number to that.

Decision, Grant, et al., v. Monterey Gold Mining Co., et al., of Supreme Court of Washington, marked as Defendant's Exhibit No. 82 for Identification.

Mr. Wayne: The decision of the Supreme Court of the State of Washington rendered October 18, 1920, in the case of Yates Machine Co., v. Lakin, et ux. reported in volume 192, Pacific Reporter, page 982.

Decision, Yates Mach. Co. v. Lakin, et ux., of Supreme Court of Washington, marked as Defendant's Exhibit No. [fol. 201] 83 for Identification.

Mr. Wayne: The decision of the Supreme Court of the State of Washington, rendered December 7th, 1910, the case of Hawley v. Bonanza Queen Mining Co., et al. reported in Volume 111, Pacific Reporter at page 1073.

Decision, Supreme Court of Washington, case of Hawley v. Bonanza Queen Mining Co., et al. marked as Defendant's Exhibit No. 84 for Identification.

Mr. Wayne: Decision of Supreme Court of the State of Washington, rendered June 22nd, 1917, case of Peck v. Linney, et al. reported in volume 165 of the Pacific Reporter at page 1080.

Decision, Peck, et al., v. Linney, et al., of the Supreme Court of Washington, marked as Defendant's Exhibit No. 85 for Identification.

Mr. Wayne: Decision of the Supreme Court of the State of Washington, rendered May 16, 1921, case of Wilkins Ditch Co., v. Drake et al., reported in volume 197 of Pacific Reporter at page 769.

Decision, Wilkins Ditch Co. v. Drake, et al., of Supreme Court of Washington, marked as Defendant's Exhibit No. 86 for Identification.

Mr. Wayne: Decision of Supreme Court of the State of Washington, rendered July 15th, 1925, case of State, ex rel. [fol. 202] Bowen vs. Superior Court of Snohomish County et al. reported in volume 237 of Pacific Reporter, page 722.

Decision, State ex rel., Bowen v. Superior Court of Snohomish County, et al., of Supreme Court of Washington, marked as Defendant's Exhibit No. 87 for Identification.

Mr. Wayne: Decision of Supreme Court of the State of Washington, rendered on May 12, 1926, in the case of Boyce v. Hinkle, reported in Volume 245, of the Pacific Reporter, at page 927.

Decision, Boyce v. Hinkle, of Supreme Court of Washington, marked as Defendant's Exhibit No. 88 for Identification.

Mr. Wayne: Decision of Supreme Court of the State of Washington, rendered on October 25th, 1926, in the case of Haynes et al., v. Central Business Property Co., et al., reported in Volume 249 of the Pacific Reporter at page 1057.

Decision, Case of Haynes, et al. v. Central Business Property Co., et al. (Matthews et al., Interveners), of Supreme Court of Washington, marked as Defendant's Exhibit No. 89 for Identification.

D. E. Watson, having been previously sworn now called as a witness on behalf of defendants, and testified as follows:

[fol. 203] Direct examination.

The Court: The exhibits will be admitted.

Defendant's Exhibits No. 82 to 89 inclusive admitted in evidence.

Minutes of meeting of Board of Directors of Coeur d' Alene Mines Corporation, March 11, 1936 marked as Defendant's Exhibit No. 90 for Identification.

Mr. Wayne:

Q. Mr. Watson, showing you defendant's exhibit No. 90, will you state what that is?

A. Minutes of director's meeting, Coeur d'Alene Mines Corporation, held March 11, 1936.

Mr. Wayne: We offer exhibit No. 90 and ask leave to substitute a copy. (Hands to counsel.)

Mr. Potts: We object to plaintiff's exhibit No. 90 on the grounds that it is incompetent, irrelevant and immaterial and is a self-serving declaration and not binding on the plaintiff. Purports to be action by the directors of the defendant corporation.

Mr. Wayne: It is the action by the directors under which this forfeiture or cancellation notice was served I think on the same date—that is right.

The Court: Objection overruled.

Defendant's Exhibit No. 90 admitted in evidence. Minutes of adjourned meeting of Board of Directors of Coeur [fol. 204] d'Alene Mines Corporation April 14, 1936, marked as Defendant's Exhibit No. 91 for Identification.

Mr. Wayne:

Q. Showing you defendant's exhibit No. 91 will you state what that is?

A. Minutes of directors meeting, Coeur d'Alene Mines Corporation held April 14, 1936.

Mr. Wayne: Q. I offer exhibit No. 91 and ask leave to substitute a copy. (Hands to counsel.)

Mr. Potts: We object to exhibit No. 91 as incompetent, irrelevant and immaterial and self-serving. Not binding upon the plaintiff.

The Court: Objection overruled. It will be admitted.

Defendant's Exhibit No. 91 admitted in evidence.

Verbatim report of annual meeting of shareholders of Coeur d'Alene Mines Corporation held at Coeur d'Alene Idaho, May 9, 1936, marked as Defendant's Exhibit No. 92 for Identification.

Mr. Wayne:

Q. Mr. Watson, showing you defendant's exhibit No. 92, will you state what that is?

A. That is a verbatim report made by a reporter in attendance at the special meeting held in Coeur d'Alene, Idaho May 9th, 1936.

Q. And adopted as the minutes of that meeting?

[fol. 205] A. That is correct.

Q. First of all, will you tell me, from your record, how much stock A. C. Frost & Company voted personally?

Mr. Potts: Objected to as immaterial, and irrelevant and not responsive to any issues in this case.

Mr. Wayne: Offered for the purpose of showing the transaction of opposing this suit.

The Court: Objected overruled.

A. Did you say A. C. Frost & Company?

Mr. Wayne:

Q. Yes, the A. C. Frost concern.
A. By proxy?
Q. No, in person.

Mr. Potts: Same objection to this, and on the additional ground it was entered after this contract was entered into or this transaction occurred.
The Court: Objection overruled.

A. He voted in person 300,500 shares.

Mr. Wayne:

Q. How much by proxy?
A. 227,273 shares.
Q. You served, did you not, upon the committee which checked the proxies and determined—well, the credentials committee?
A. Yes, I was with the committee.
Q. Who were the other members?
A. Mr. Keane and Mr. Roy Kingsbury.
Q. That is F. C. Keane?
A. F. C. Keane.
Q. Was there any stock which A. C. Frost & Company presented for the purpose of voting at that meeting, that they were denied the right to vote?
[fol. 206] A. There was.
Q. Can you tell me from the minutes the amount of that?

Mr. Potts: May our objection as to the immateriality and irrelevancy of this testimony go to all the evidence along this line that is offered?
The Court: Yes.

A. According to the minutes there was 60,000.

Two proxies attached to certificate of A. C. Frost consisting of two sheets, marked as Defendant's Exhibit No. 93 for identification.

Mr. Wayne:

Q. I show you defendant's exhibit No. 93, will you state whether or not that is the proxy presented for 60,000 shares upon which he was refused the right to vote?
A. It is.

Mr. Wayne:

Q. I offer defendant's exhibits No. 92 and 93 in evidence. (Hands to counsel.) And ask leave to substitute a copy of 92 but not 93. I offer the original of that.

Mr. Potts: We object to exhibit No. 92 and 93 on the ground that they are incompetent, irrelevant and immaterial and that they refer to an event or occurrence on May 9th, 1936 long after the contract and transactions involved in this case.

The Court: Objection overruled. They will be admitted.

Defendant's Exhibits No. 92 and 93 admitted in evidence.

Mr. Wayne:

Q. Mr. Watson, I think you testified that you had really set up the set of books that is now used by the defendant corporation?

[fol. 207] A. I did.

Q. And you are thoroughly familiar with them, are you?

A. I believe so.

Q. Will you state whether the Coeur d'Alene Mines Corporation has, ever, at any time, had any earnings from operations?

A. Never.

Q. Has it ever had any earnings whatsoever except from the sale of stock or levy of assessments?

A. I think in 1929 there was quite a little money came in as interest on some bank deposits at that time and we now take in a small amount of money that is being set against expenses or transfer fees.

Q. Since 1935 has it had any ear-ings except from the sale of stock or levey of assessments or transfer fees?

A. No.

Q. Mr. Watson, have you prepared a summary of the payments falling due under the Boland option of September 10th, 1934, according to the terms of that instrument?

A. I have.

Schedule No. 1 payments due under Boland option of Sept. 10, 1934, marked as Defendant's Exhibit No. 94 for identification.

Q. Showing you defendant's exhibit No. 94, will you state if that is the schedule you prepared?

A. It is.

Q. Now, in explanation of that, will you tell me what is shown in the first column?

[fol. 208] A. The first column shows the dates, the payments falling due under the original contract.

Q. And the second column?

A. Shows the amount of those payments.

Q. And the third column?

A. Third column is cumulative total of those amounts progressing by months.

Q. You mean by that the total amount that you have fallen due under the contract according to its terms on each payment date?

A. That is correct, as the contract matured the total accumulates show all prior payments as of that date.

Q. What is the next of fourth column?

A. Shows payments made by Boland and A. C. Frost & Company under the contract.

Q. Fifth column?

A. Shows payments made by sales or treasury sales.

Q. You mean sales other than by Boland or A. C. Frost & Company?

A. That is correct.

Q. Now the next or sixth column?

A. Sixth column is a column showing the cumulative payments by months including both payments by Boland and A. C. Frost & Company on sales of treasury shares.

Q. And the final——

A. The final column is a long and short column. In this column it is a case of short column, showing A. C. Frost & Company's position in their order as regards the cumulative payments due under various dates under the original instrument.

[fol. 209] Q. Will you take the date of February 10, 1935, what was the condition of the option at that time?

A. A. C. Frost & Company——

Mr. Potts: Object to that question as calling for an opinion and conclusion of the witness.

Mr. Wayne: He is testifying—it is just based upon the contract itself. It is illustrative.

Mr. Potts: Even so, I don't think he has a right to express his conclusion or explanation on the standing of the evidence.

Mr. Wayne: He is the auditor. He has made this upon the basis of there being no modifications.

Mr. Potts: It is an explanation itself.

The Court: He may answer.

A. February 10th, 1935, A. C. Frost & Company was short $3400.00 on its payments.

Mr. Potts: Move that be stricken out because it is thoroughly immaterial under the pleadings since it is admitted in the answer that any defaults prior to May 11, were waived. The answer expressly admits that. Therefore it is entirely immaterial as to what transpired in the way of being short or not prior to that date.

Mr. Wayne: It is simply offered for the purpose of illustration, if your Honor please.

Mr. Potts: Yes, but it illustrates something, if your Honor please, that is not material under the issues in this case. The letters of modification of this option contra-t was expressly pleaded in the complaint and it was expressly admitted in the answer. And the claim and theory the defendant is setting up in this answer is that the denial occur-ed in the modified option agreement and is pleaded in the original option agreement.

[fol. 210] Mr. Wayne: That is our position now, but we are showing what the condition of it was whether the option had been modified or not. We have another exhibit that I am presently going to offer in evidence.

Mr. Potts: We object to this, because it is inconsistent with the theory of defense to the pleadings in the case and particularly the pleadings and allegations contained in the answer. In paragraph five of the answer it expressly admits that the option agreement, exhibit "A", was modified by changing certain payments so there should be paid on or before April 27th, 1935, $1000.00; on or before May 10th, $2000.00; on or before June 10th, $2000.00 and the fact is that modification is offered in evidence and was accepted and agreed to by defendant. And further over the defendant expressly alleges in paragraph five of the answer that the plaintiff defaulted in making the payment of $2000.00 falling due under the terms of Exhibit "A" on May 10th, 1935.

The Court: Mr. Potts, there has been evidence introduced to show the reason for the modification. I don't know whether this testimony will lead to that matter or not.

Mr. Potts: Well, it is outside the issues. It is outside the issues as made by the pleadings as to the original option.

The Court: I see. It would not be material only for that particular reason as the court sees it. Mr. Frost has given his reasons why the explanation *was* the modification was made and this may lead to the same condition. I don't know. That would only be the theory upon which it would be admitted.

Mr. Wayne: That is one theory upon which it is offered.

The Court: The objection will be overruled.

A. A. C. Frost & Company was short in its payments [fol. 211] on the contract as of that date, $3400.00.

Mr. Wayne:

Q. As of March 10th, 1936, what was the condition?

Mr. Potts: Same objection.

The Court: Overruled.

A. As of March 10th, 1936, they were short $80,515.

Mr. Wayne: I now offer exhibit No. 94.

Mr. Potts: May I ask a question?

Q. As to this last date, the figures you gave, does that take into consideration the credit on the books?

A. Yes, sir, that takes into consideration all credits on the books.

Mr. Wayne:

Q. Let me ask you, Mr. Watson, does that take into consideration the credit both on account of sales which had been made direct by A. C. Frost & Company and payments made by them as well as the sales of treasury stock by others?

A. It does. It includes those credits.

Q. For instance then, it includes the 80,000 sold to Gibson and 20,000 sold to J. E. Jones?

A. They are included in those figures.

Q. Will you state whether or not it also includes the sales of stock made by R. W. ~~N~~uzum?

A. Yes, it includes the treasury shares sold by R. W. Nuzum up to the spring of that year.

Mr. Potts: We object to defendant's exhibit No. 94 on the grounds it is incompetent, irrelevant and immaterial

and not responsive to any issues in this case and is inconsistent with the defense set up in the answer and in particular that it is admitted that any defaults prior to May 11th, 1935 were waived and it is also expressly admitted that the option agreement was modified so that these pay-
[fol. 212] ments as set forth in this exhibit were not required.

The Court: As I stated before, the only theory upon which this could be admitted would be an explanation of the reason for the modification. And if counsel does not connect that up, of course the objection will be sustained. I will admit it subject to the objection of counsel.

Defendant's Exhibit No. 94 admitted subject to objection.

Schedule No. 2 payment Due under Boland Option of Sept. 10, 1934, as modified, marked as Defendant's Exhibit No. 95 for identification.

Mr. Wayne:

Q. Mr. Watson, did you make up a schedule similar to Exhibit No. 94 showing payments falling due and actually made under the option as modified?

A. I did.

Q. Will you look at defendant's exhibit No. 95 and see if that is the schedule which you prepared?

A. It is.

Q. And what payments have you taken as falling due on April 27th, 1935?

A. $1000.00.

Q. And on May 10th?

A. $2000.00.

Q. And June 12th?

A. $2000.00.

Q. July 10th?

A. $3500.00.

[fol. 213] Q. August 10th?

A. $3500.00.

Q. September 10th?

A. $3500.00.

Q. October 10th?

A. $5000.00.

Q. From that time on how much?

A. $5000.00 per month.

Q. Now, taking those figures, will you tell me what the condition of the option was according to the revised payments on the 10th of November, '35?

Mr. Potts: *A* Objected to as incompetent, irrelevant and immaterial and calling for a conclusion and opinion of this witness.

The Court: Overruled.

A. Frost was short in his payment $1515.00.
Q. On March 10th, 1936?

Mr. Potts: Same objection.

Mr. Wayne:

Q. What was the condition?

The Court: Overruled.

A. He was short $21,515.00.

Mr. Wayne:

Q. Now, does that take into consideration all sales of stock which had been made?
A. Takes into consideration all—all sales of stock under that option.

The Court: As modified?

A. As modified.

Mr. Wayne: We offer exhibit No. 95. (Hands to counsel.)
Mr. Potts: We make the same objection to this exhibit.
The Court: Overruled.

[fol. 214] Defendant's Exhibit No. 95 admitted in evidence.

Mr. Wayne: You may cross examine.
Mr. Potts: No cross examination.

(Witness excused.)

Florence E. Coffeen called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Mr. Wayne:

Q. Miss Coffeen, will you state your name?

A. Miss Florence Coffeen.

Q. Where do you live?

A. Spokane, Washington.

Q. What is your occupation?

A. I am stenographer and secretary for the law firm of Nuzum & Nuzum.

Q. How long have you been in their employ?

A. For more than twenty-five years.

Q. Were you in their employ in the month of May, 1935?

A. I was, yes, sir. I was secretary and treasurer of the Coeur d'Alene Mines corporation at that time.

Q. And also employed——

A. Also employed as secretary of the law firm.

Q. Do you remember of Mr. A. C. Frost being in your office on or about—on or about May 11th, 1935?

A. I do. I remember it.

Q. Were you present at any conversation between Mr. Nuzum, Mr. R. W. Nuzum and Mr. Frost on that date?

A. I was in Mr. Nuzum's office.

[fol. 215] Q. As a result of that conversation was there a letter written by A. C. Frost & Company?

A. A letter was dictated to me by Mr. Frost on that date.

Q. I show you this exhibit No. 55 and will you state who dictated that letter?

A. Mr. Frost dictated that letter in the presence of Mr. Nuzum and myself to me. His initials are there and the "C" is my initial.

Q. You then typed it?

A. I typed it, yes, sir.

Q. Were you present at the conversation ~~which~~ preceded the dictation and writing of this letter?

A. I was, yes, sir.

Q. Well, will you state first who proposed the giving of this commission to Mr. Nuzum?

A. Mr. Frost stated to Mr. Nuzum that he wanted him to have that commission. That percentage of the sales that were mentioned is stated in the letter because he had given so much time to the work of the Coeur d'Alene Mines and had been so attentive to it and he wanted him to have that.

Mr. *Mr.* Nuzum said "Well, it should go to the company". He said "No, you are the one who has done the work all these years and it is you that should have it and I want you to have it".

Q. Will you state whether or not in that conversation Mr. Nuzum ever suggested the giving of a commission to himself?

A. Not at all. It came from Mr. Frost.

Q. Miss Coffeen, I show you a paper marked plaintiff's exhibit No. 14, will you tell me who actually wrote that?

[fol. 216] A. Mr. Frost dictated that letter to me and I typed it.

Q. Now, at whose request was that?

A. It was Mr. Frost's proposition.

Q. What had Mr. Nuzum to do with it?

A. He had nothing to do with it. He was in the room when it was dictated.

Q. Did he have anything to do with the dictation?

A. No, not a thing to do with it.

Mr. Potts: What exhibit was that?

Mr. Wayne: No. 14. You may examine.

Cross-examination.

Mr. Potts:

Q. Miss Coffeen, on this occasion about which you have testified on May 11, 1935, Mr. Frost and Mr. Nuzum were in a conference, were they not?

A. Yes, sir.

Q. Before you were called into the conference for the purpose of taking dictation they had been in conference for some time, had they not?

A. I don't recall. That was more than two years ago. I don't recall how long there were in conference, but they usually were in conference before I took dictation.

Q. Mr. Frost came from Seattle to confer with Mr. Nuzum, had he not?

A. He had, yes, sir.

Q. Do you remember what time of morning they met there in the office?

A. No, I don't recall.

Q. And isn't it a fact that they had been in conference [fol. 217] two or three hours before you were called in there

to take dictation?

A. I don't recall that.

Q. When you were—you were called into Mr. Nuzum's private office?

A. Yes, Mr. Nuzum's private office.

Q. Mr. Frost and Mr. Nuzum were both there?

A. Both there, yes, sir.

Q. They both remained there while the matter was being dictated?

A. Yes, sir.

Q. And as it was being dictated Mr. Nuzum made no objection to it, did he?

A. None whatever. He did make the suggestion the money should go to the company and then Mr. Frost stated very emphatically that it was Mr. Nuzum who had done all the work and put in so much time and that he thought he should be reimbursed.

Q. And then Mr. Nuzum withdrew the objection to having the money go to him?

A. I don't recall him saying anything more.

Q. He didn't object very strenuously to the subject of the dictation, did he?

A. I don't know that you would call it strenuously. He made that suggestion that *he* should go by the company?

Q. But after Mr. Frost stated he thought it should go to him, Mr. Nuzum acquiesced?

A. Yes, Mr. Frost signed the letter.

Q. You started and finished the dictation?

A. I did, yes.

[fol. 218] Q. And went out and wrote the letters on the typewriter?

A. I did.

Q. Two of them, were there?

A. Not at that time. Just the first one was written then. This letter, this one in the minutes was written.

Q. During the same day?

A. Same day.

Q. And during the same conference?

A. Same time, yes.

Q. Then both letters were signed at the same time, were they not?

A. I don't recall the time they were signed but Mr. Frost signed the first one and my initials are on both of those

letters opposite Mr. Frost's initials and I know for that reason—I know that it is the letter I typed.

Q. Both letters were signed by Mr. Frost there in the office and left——

A. I don't recall.

Q. With Mr. Nuzum?

A. I don't recall the time Mr. Frost signed the second letter or the letter that is in the minutes. The first one, exhibit No. 14. The shorter letter that gave the amount to Mr. Nuzum is the one I particularly remember him signing at that time.

Q. You do remember he signed the other letter?

A. Yes, he signed the other letter and — have the original of that in the files of the company.

Q. And both letters were dictated, written and signed during that conference?

[fol. 219] A. I wouldn't say the second letter was signed at that time, but it was dictated by Mr. Frost at that time.

Q. And written by you?

A. Written by me.

Q. And delivered?

A. And typed by me. I don't know—I might have mailed it over to him—I don't recall about that. But the first one, Exhibit No. 14, I do remember very distinctly was signed at that time.

Mr. Potts: That is all.

Redirect examination.

Mr. Wayne:

Q. Miss Coffeen, No. 14 is a letter which I now show you, which is in the minute book?

A. Well, I didn't mean No. 14. I beg your pardon. The shorter letter, the first one you showed me is the one he signed at the time. I was mistaken about it being exhibit No. 14.

Q. Showing you Exhibit No. 55, which one of these is it?

A. This is the one.

Q. No. 55?

A. This one dated May 11, is the one that was signed that day that it was dictated.

Mr. Wayne: That is all. (Witness excused.)

R. W. NUZUM called as a witness on behalf of the defendant company, being first duly sworn, testified as follows:

Direct examination.

[fol. 220] Mr. Wayne:

Q. Mr. Nuzum will you state your name?
A. R. W. Nuzum.
Q. Where do you live?
A. Spokane.
Q. What is your profession?
A. Attorney at law.
Q. Are you acquainted with the defendant, Coeur d'Alene Mines Corporation.
A. Yes, I had to do with it from its inception.
Q. Did you ever hold any office in it?
A. Well, I held, during Judge Turner's life time, I was vice president and after Judge Turner's death I was president.
Q. Were you president of the corporation during the years 1934 and 1935?
A. Yes, sir.
Q. And you were familiar with its operating and its financial condition during all that time?
A. Yes, sir.
Q. Now, first, Mr. Nuzum, I want to show you defendant's exhibit No. 55 and will you state fully what occur-ed at the dictation and signing of that exhibit?
A. Well, that was after we had sold Gibson, I think, 80,000 shares of stock. By "we" I mean the corporation. I had no date with Mr. Frost, but he came in and claimed all over 10¢ that had been received for the stock. We had quite an argument over that. I told him that he wasn't entitled to it and that he had nothing to do with getting the sale and he then said "well, under his contract, he thought he had" [fol. 221] that while he was very liberal, he would stand on his rights under the contract. And we had—oh, I don't know, it had been two hours and he wasn't there in the afternoon at all. He came in the morning and then he talked over what he would do, that all over 10¢ outside of the Gibson stock and 20,000 more of the Jones stock should remain in the treasury of the company. He explained to me that he was desperately in need of money and that he

had to have money and I told him I would take that up with the trustees. He even suggested to me and I heard his testimony, that I asked him for this. That is absolutely false. That he was willing I should have twenty-five per cent of the profits of the 100,000. I said to him "why not give it to the company"? He said absolutely he would not. He said "you are the one who has given a great many years of your life to this company and kept it alive and you advanced money to keep it alive and you have brought it to this present stage and you are the one that is entitled to it" and he dictated this letter to Miss Coffeen.

Q. In your presence?

A. In my presence.

Q. Did you have anything to do with the dictation of it?

A. Not a thing, Mr. Wayne and there is something in here I didn't even know until I saw this original. It is about that fifty per cent proposition as to the profits—second paragraph. (Reading): "It is also agreed that you shall receive 50% of the profits of the approximate 100,000 shares of treasury stock recently sold by you". This was dictated and signed by Mr. Frost, but I didn't even know—and if I knew it, I don't remember that paragraph was in there. I [fol. 222] didn't know it until I saw this original.

Q. Did you ever receive fifty per cent of the proceeds?

A. No. No.

Q. Proceeds of that sale of stock?

A. No.

Q. Mr. Nuzum, showing you plaintiff's Exhibit No. 14, state if you were present when that letter was dictated?

A. I was there when it was dictated.

Q. Who else was there?

A. Well, it was dictated to Miss Coffeen. Miss Coffeen was the secretary and treasurer of the corporation and she was also in the office as she testified she has been a good many years.

Q. Well, was Mr. Frost there?

A. Frost was there, of course.

Q. Who dictated that letter?

A. Mr. Frost.

Q. At whose request, if anybody, was it dictated?

A. Beg pardon?

Q. At whose request, was it dictated?

A. Well, he wanted—we had to have some proposition to

put up to the trustees and I was claiming all this money belonged to the corporation. I told him to dictate his proposition and the only thing I did suggest was when he was outlining what the money was to be used for (reading) "Third: Nuzum & Nuzum are to be reimbursed for all advances, with interest at 7% per annum, out of the funds now in the treasury". I had loaned them $7000.00, advances my brother and I had made to keep the thing alive and to pay bills. I said to him I thought I should have seven per [fol. 223] cent interest as I was, myself, paying eight per cent at the bank for money that I had borrowed that I wouldn't need to have borrowed if I hadn't put out this $7000.00, and that is the only suggestion I made. I wanted this to come from Mr. Frost so he couldn't have said that I had executed it. He offered it.

Q. You put that letter up to the Board of Directors?

A. I put that letter up to the Board of Directors. There is the meeting, I guess—you got the exhibit here. I put that letter up to the Board of Directors and they were all there. You will notice this original was filed and that was presented to the Board of Directors.

Q. The minutes you refer to was exhibit No. 51, are they not?

A. Yes. I will have to check the date from the minutes. I have no independent recollection that it was the 15th of May. I will read this over—(witness reads exhibit). Yes, that is the minutes of that meeting as shown by defendant's exhibit No. 51. That is what took place.

Q. Mr. Nuzum, I show you exhibit No. 50, will you state who dictated that letter?

A. Mr. A. C. Frost.

Q. Were you present at the time?

A. I was.

Q. Who suggested the writing of that letter?

A. Well, I might have suggested it, Mr. Wayne. I wish you would get me the exhibit there showing payment of the internal revenue taxes some time later in April, I think, to show that—isn't that about it.

Statement of Treasury Department, Office of Deputy Col-
[fol. 224] lector Internal Revenue Service marked as Defendant's Exhibit No. 96, together with other attached exhibits marked as Defendant's Exhibits 96-A and 96-B for identification.

Mr. Wayne:

Q. Showing you Defendants Exhibits No. 96 and 96-A and 96-B in connection with the exhibit No. 50, will you state fully——

A. There had been a claim of the Internal Revenue Department for transfer taxes amounting to $1280.06 that had been pending pretty nearly since the organization of the company. All of the stock of the company was transferred by Joseph R. Gowan who bought the option and taxes was paid on that issuance to Donald although there was no official issuance. He then donated one-half to the treasury and the treasury claimed we must not only pay taxes on the original issue but on this one-half donated back. And Judge Turner had been—oh, he had been contending against that all of his life and in this spring of 1935 the Internal Revenue people came to me and they had made a levy. The interest altogether amounted to $1920.09, and they were trying to attach the property and sell it. I didn't have any money and couldn't raise it, so we went over to Tacoma and I was acquainted with Mr. Vierhus, who was then the collector—the Internal Revenue Collector, for that district and he has since passed away, and I had a visit with him and explained the situation and got that payment extended thirty days. I went over to Mr. Frost's office there—that was either on the 23rd I talked with Vierhus or the 22nd, and I went over to Frost's office on the 22nd, I [fol. 225] saw Mr. Frost the next day. You know, your Honor, the Internal Revenue headquarters for that district is in Tacoma and Mr. Frost's office was in Seattle—and I told Mr. Frost what the situation was. I told him he hadn't been able to raise the money and that this money had to be paid or the property was going to be sold and something must be done about it. He said he couldn't raise it and didn't have any money and I said then I called—well, practically the words were—"that I can sell treasury stock and carry on with this company". Now, I may have dictated that or he may have done it, but it was done in Mr. Frost's presence. Dictated to a lady that he introduced to me as Miss Belknap in Mr. Frost's office. I never heard his testimony—it was in his office—I don't know whether she had an office. If she had one I was never in there but in Frost's office.

Q. Was there any understanding between you and Frost that that letter should mean anything other than it's contents?

A. No. I heard Mr. Frost's testimony——

Mr. Potts: We object to this evidence on——

A. That was to straighten out something about——

Mr. Potts: We object to any statements without being responsive to questions.

The Court: Yes. Make your answers responsive to questions.

A. All right, you didn't want the other statement.

Mr. Wayne:

Q. What was meant by this statement "by reason of the present market conditions" in this letter, Exhibit No. 50?

Mr. Potts: Objected to as calling for a conclusion of the witness.

The Court: He may answer as to what was said.

[fol. 226] A. Well, the stock hadn't been moving at all. Mr. Frost hadn't been able to sell any. That is what I meant by that.

Mr. Potts: Just a moment—I move that the answer be stricken out as not responsive. The question is, what was said, not the context as to what conditions existed.

The Court: He may state the conversation.

A. That was practically—I don't remember the words, your Honor, but we talked over the fact that the stock wasn't moving and Mr. Frost said he couldn't sell any and I thought—I could at least—I was going to try. That was about the extent of that conversation.

Mr. Wayne:

Q. Well, what were the market conditions so far as this particular stock was concerned at that time,—the latter part of April, 1935?

A. Well, that is a long time ago. I know there was very little movement in the stock, if any, as I recall it.

Q. Now, digressing for a moment—in some of the correspondence here between yourself and Mr. Frost or the A. C. Frost & Company, there are reference to a Mr. Losol. Who is that?

A. How is that?

Q. Losol?

A. Losol was the secretary of the Mineral Point Mining Company from which the corporation—we had a bond on the Mineral Point group of claims.

Q. At that time you had made no payment on the bond?

A. We had not.

Q. Now, who was McCarthy mentioned in this correspondence?

[fol. 227] A. James F. McCarthy, president of the Hecla.

Q. What, if any connection, had he with the Mineral Point?

A. He was one of the trustees of the Mineral Point and I am not sure, Mr. Wayne, but what he was vice president.

Q. Did you know a man mentioned as Ayre in this correspondence—correction—Asher?

A. Well, Asher was a representative of the heirs of Bill Osborn and the heirs of Bill Osborn, as I understand it, owned control of the Mineral Point Mining Company.

Q. And it was from them and the Mineral Point you were seeking an extension of time?

A. Yes.

Q. Now, what was the condition of the Coeur d'Alene Mines Corporation so far as its finances and its debts were concerned from January 1st, 1935 on? Well, say January 1st of that year?

A. Well, I think that prior to that time we had paid what—some debts that were due when the property was shut down. I think perhaps about all was the pay rolls every month and the electric light and power bills and we were desperately out for money all the time.

Q. Will you state at that time whether you were having any difficulty obtaining the payments from A. C. Frost & Company under this option?

A. All the time. There was three payments made from Chicago in the name of W. J. Boland and from that time on there was always more or less difficulty in getting the money out of Frost.

Q. You had payments on the Mineral Point bond falling [fol. 228] due May 15th, 1935 of $75,000?

Mr. Potts: Objected to as immaterial.

A. Was that May 15th or April 15th—either May or April 15th, for the remainder of the bond if paid at that

time and all it was was $75,000.00 and a year later $100,000.

Q. In other words, by taking advantage of the year you would lose $25,000.00?

A. Yes.

Q. Now, do you know of your own direct knowledge what A. C. Frost & Company's financial condition was at that time—that is from January 1st, 1935 to June 1st, 1935 and what was their ability to meet payments under this Boland option?

A. I know——

Mr. Potts: Objected to as incompetent and immaterial and calling for an opinion and conclusion of the witness.

The Court: Overruled.

A. I know from what Mr. Frost himself told me.

Mr. Wayne:

Q. Now, what did he tell you?

A. Frost told me that he was in debt $450,000.00. That during that period from 19—some in '35 that there was back taxes on two additions that he had in Seattle, I think Uplands or Highlands of $36,000.00. That he had been living on borrowed money for six years and then running way back a great sum. He told me this first when I was trying to get him to pay a note at the Spokane & Eastern which he had given them and Turner had given our note as collateral to raise $2500.00 and endorsed the checks which Frost had given turner and that had been turned down as no good. The note fell due at that time, but before that—[fol. 229] before Judge Turner's death I took Frost over and got him to make it good. He told me himself outside of the fact that he had some bonds or some stocks over in Vancouver, that some brokers in Toronto hoped to sell for him that they were about the only resources he had and he was complaining they were not selling and he was not getting the money and that was up to '36.

Q. '35.

The Court: June '35.

Mr. Wayne: June 1st, '35. Now, what if anything, did Frost ever say to you in regard to his ability to meet the payments under the Boland contract?

Mr. Potts: Objected to unless it is more definitely fixed as to time.

Mr. Wayne: I am speaking of between a period after January 1st, 1935.

A. Well, my recollection is that when—wasn't there a change in the payments sometime in March or April which he was to pay certain sums then increased to $5000.00 a month.

Q. I am asking you, Mr. Nuzum, what he said?

A. He asked me about the change in those payments and I said "can't you make them"? He said "no". Well, I said, "I am not going to put this up to the trustees until we know you can't make it".

Q. Which payments are you speaking of?

A. That was some change in payments on the Boland contract.

Q. Were you speaking of the payments as required by the original contract or the modified contract?

A. As modified. He told me he couldn't make the payments as to the original payment and requested this modi-
[fol. 230] fication.

Q. You say he requested the modification?

A. Oh, yes.

Q. And at that time—at the time when he sought the modification for the amount of the payments and the dates, what was the financial condition of the Coeur d'Alene Mines Corporation at that time?

A. Well, there was a time when there was a $1000.00 payment over-due. I think that is about the time. There was $1000.00 payroll due or would be due in a few days. Mr. Schedde and Mr. Frost and I went to the property and Schedde went over the property. I knew that Schedde was the one who advanced him the money because he told me so. He told me that Schedde would not advance any more and would not advance the $1000.00 and suggested that I go up and stand the workmen off for their wages a few days and I told him that I wouldn't do anything of the kind. And later, I believe my recollection is, he got the $1000.00 down there at the same time so I could make the payroll.

Q. Now, after this letter, Exhibit No. 50, of April 23, 1935, you did, yourself, sell some treasury stock?

A. Yes, sir.

Q. Will you state what is the fact as to whether the sales of stock made by you after that time were made under the permission granted by this letter?

A. Yes, sir.

Q. You had, after January 1st, 1935 and before April 23, 1935, made some sales, had you not?

A. Well, I presume I did. I don't remember. I hadn't made any, I don't believe, to any great amount.

[fol. 231] Q. Will you state whether or not prior to making of these sales you obtained any permission from A. C. Frost & Company?

A. I told him I was selling.

Q. Will you state whether or not he objected to it?

A. No, he never made any objection.

Q. What is the fact as to whether or not he was given credit on the contract for those sales?

A. Now, I presume he was, but the books would show that, Mr. Wayne. You know I don't keep books and undoubtedly that is where they got the money to make some of those payments.

Mr. Wayne: I think that is all for the present. I did want the witness to testify to that exhibit No. 56 and that has been mislaid.

The Court: We will recess for fifteen minutes.

(Following recess, Mr. Nuzum, again resumes the witness stand.)

Mr. Wayne:

Q. Mr. Nuzum, I show you a letter dated June 15th, 1936 marked defendant's exhibit No. 56, state whether or not that is your signature?

A. It is.

Q. Who did you deliver it to, if anyone?

A. It was mailed to D. E. Watson, the mine secretary.

Q. Secretary——

A. Secretary of Coeur d'Alene Mines Corporation.

Mr. Wayne: We now offer Exhibit No. 56.

Mr. Potts: Object to exhibit No. 56 as incompetent, irrelevant and immaterial and self-serving. Are you offering assistance in this case purporting to be added after the service of the written notice of cancellation of the con-[fol. 232] tract sued on? I would like to ask Mr. Nuzum a question in regard to this.

Mr. Potts:

Q. Mr. Nuzum, this letter bears date of June 15th, 1936, does it not?

A. I just looked at it a moment ago—I assume it does. You would tell me if it did or not.

Q. March 13th, 1936, at least two months before the date of this letter you caused to be served on A. C. Frost & Company a notice of cancellation of this option agreement, did you not?

A. The trustees caused it to be served.

Q. Then you were serving as trues-ee of the corporation and you caused it to be served?

A. I consented and the trustees caused it to be served.

Q. And also the audit of the books of the defendant corporation had been completed by auditors employed by Mr. Frost prior to the sending of this letter?

A. That is a second letter.

Q. Prior to June 15th, 1936 his audit had been completed?

A. There was two audits.

Q. All had been completed?

A. All had been completed according to my recollection. I know the one in the fall of 1935 had been completed, but I don't remember when this second one was completed.

Q. Well, you recall it was completed in the month of April, 1936?

Mr. Wayne: If your Honor please, this is not proper cross-examination.

Mr. Potts: It is with reference to the time of sending this.

[fol. 233] Witness: (A.) Mr. Potts, when this man came there and wanted the books, whatever time it was, they got them. I didn't pay any attention to the audit and whatever the record shows when they made the audit is undoubtedly correct.

Mr. Potts:

Q. This letter is addressed to Mr. D. E. Watson, Secretary of the Coeur d'Alene Mines Corporation?

A. Yes.

Q. Mr. D. E. Watson is your nephew?

A. My wife's nephew.

Q. Your wife's nephew?

A. Yes.

Mr. Potts: We insist on the objection as still being incompetent, irrelevant and self-serving.

The Court: May I see it. (Hands to court.)

The Court: The objection will be overruled.

Defendant's Exhibit No. 56 admitted in evidence.

Mr. Wayne: That is all.

Cross-examination.

Mr. Potts:

Q. Mr. Nuzum, when did you commence having more or less trouble securing payments under the option from A. C. Frost & Company?

A. As soon as the Boland payments—understand, Mr. Potts, the first three payments were wired to the Spokane-Eastern on account of Will J. Boland.

Q. I understand that.

A. And these were the only payments that came promptly.

Q. You had trouble from then on getting the payments, [fol. 234] did you?

A. Yes.

Q. Just what trouble did you have getting this check of A. C. Frost & Company of $2500.00 dated December 10, 1934.

A. Well, I got that check but I didn't take it to get the money out until I knew it was good. We had checks from Frost before.

Q. I am asking you what trouble you had getting that check?

A. That one came on December 10th.

Q. You didn't have any trouble getting it, did you Mr. Nuzum?

A. It was paid and apparently went through the clearing house, but if you will notice that it was sent through and got to Seattle on the 19th and when the notification came back it was alright and we got the money. I hadn't used it before.

Q. You didn't have any trouble getting it, did you?

A. No.

Q. As a matter of fact, on December 11th, you acknowledged receipt of that check.

A. You notice I acknowledged——

Q. You did acknowledge the check?

A. I acknowledged it as a check.
Q. That is what I am asking you.
A. Not as payment.
Q. Have you acknowledged receipt of the check?
A. Yes, the check but not as to $2500.00 in payment.
Q. So it got through promptly without any effort whatever on your part, didn't it?
[fol. 235] A. Yes.
Q. You didn't have "more or less" trouble or any trouble getting the payment?—December 10th, 1935?
A. Not this check as you call my attention to it.
Q. And of course when you issued the stock to cover any payment under that option it was issued because of the payment, wasn't it?
A. Yes.
Q. And you directed the issuance of the stock, didn't you?
A. Well, the secretary would undoubtedly issue it and I would sign it. I didn't give any instructions.
Q. On December 13th, you caused 25,000 shares of stock to be issued and send to A. C. Frost & Company?

Mr. Wayne: Objected to as not cross-examination.

A. At that time I drew the check. At that time I knew the check was good. I didn't issue it when I received the check, if you noticed that.

Mr. Wayne: If your Honor please, I move that this question and this answer thereto be stricken for the reason it is immaterial. Not proper cross-examination.
The Court: Well, I think it is.
Mr. Wayne: We never claimed either a breach of payments or a failure to make them back in December, 1934. I confined my questioning to January 1st, 1935 and to June 1st, 1935.
The Court: Yes, but the witness has testified he had difficulty after the Boland contract was transferred, after these checks came from Chicago.

Mr. Potts:

Q. Mr. Nuzum, you look this check over, this check of [fol. 236] December, 10th, 1934 and you put it through—it wasn't cleared until the 19th of December and wasn't accepted as payment until it was cleared. I will ask you

if you didn't send that stock on December 13th, two days after you received the check?

A. Three days.

Q. Received it on the 11th, didn't you?

A. I knew the check was alright before Miss Coffeen issued the stock. How she found out, I don't know.

Q. How could you find out if it wasn't cleared?

A. That same day. That would be the night of the 11th. The clearance would be made the next day by the bank—in the bank the morning of the 13th.

Q. What did you mean by saying this check cleared on the 19th?

A. December 12th——

Q. Referring to the 19th. You mentioned it—I haven't looked at it.

A. I was looking at this back here. I don't know what that meant. Seattle clearance Federal Reserve bank, San Francisco—that is when it came through finally in San Francisco.

Q. Actually didn't get back until the 19th?

A. As far as the Spokane bank was concerned, if the Seattle bank accepted it, then it was alright. It would go on down to San Francisco.

Q. If so, it wouldn't be clear-d on the 13th?

A. Goes to the Seattle banks and then is sent out through there.

Q. The January payment of $3500.00—January 1935, was made coming to the Coeur d'Alene Mines Corporation prior to the 17th of January, wasn't it?

[fol. 237] A. When was it due?

Q. 10th of January.

A. Oh, yes, I was—yes, Spokane-Eastern Trust telephoned—that was yesterday afternoon—that would be the 16th of January that $3500.00 had been paid to the credit of Coeur d'Alene Mines Corporation. You will notice that was about six or seven days late.

Q. It was five or six days late, wasn't it?

A. Well, due the 10th and they telephone us the 16th.

Q. That was quite prompt, wasn't it?

A. You may think so, but folks don't usually. If you owe money on the 10th they make you pay it.

Q. You didn't have difficulty with that payment?

A. When he came down—you must remember, Mr.

Wayne, my payroll was due the 15th. It came six days late. Mr. Potts, that should have been.

Q. Now, as to these letters of May 11, 1935, you did accept the terms of those letters, did you not, Mr. Nuzum, on May 11, 1935?

A. Which letter do you mean?

Q. You know both letters don't you?

A. I couldn't accept one with reference to change in the option.

Q. Well, but you did accept those letters as far as you were concerned? You didn't disagree with them or object to them during Mr. Frost's presence there, did you?

A. I don't think I did.

Q. You did afterwards accept the money?

A. I did.

Q. As provided in that letter?

[fol. 238] A. Yes.

Q. You didn't say to Mr. Frost, you thought there was anything wrong about you accepting that money, did you?

A. No.

Q. You didn't think there was anything wrong about the proposal, did you?

A. About the $5500.00 I didn't.

Q. No.

A. I told the trustees and they knew all about it.

Q. You never paid that money back to the corporation, did you?

A. I didn't consider it belonged to the corporation.

Q. You never paid it back?

A. I never did. I retained it.

Q. On June 5th, you received and kept for your own use $500.00 out of the sale of 5000 shares of stock to J. E. Jones Brokerage Company?

A. J. E. Jones—(reading) Contract includes check—paid 50¢ a share—got a check from Jones, $1500.00, $500.00 to the company and $1500.00 to Mr. Frost and $500.00 to——

Q. You don't mean $2500.00?

A. I got $2500.00. I said $1500.00 went to Frost and $500.00 to the corporation and $500.00 to me or to the firm.

Q. That was retained by you pursuant to that letter of May 11th?

A. Yes, sir.

Q. On June 6th you received $2500.00 more from J. E. Jones Brokerage Company and you retained $500.00 your-

self and sent $1500.00 to Frost & Company and turned in $500.00 to the Coeur d'Alene Mines Corporation?

[fol. 239] A. Yes, sir.

Q. And that $500.00 in each case applied was 10¢ per share under the option contract?

A. Yes.

Q. And on June 12 for which we have no letter, a similar transaction occur-ed on or about that time, did it not?

A. Now, the books should show.

Q. The last, or later on June 14th that shows that was the fourth installment—fourth or last of that Jones deal?

A. $1500.00 covering the remainder of 20,000 shares pursuant to the understanding. $500.00 of this $2500.00 was being placed to the credit of the corporation and I am retaining $500.00.

Q. That was the fourth of the 5000 lot?

A. Yes, I assume it was from that?

Q. What is that?

A. I don't have distinct recollection, Mr. Potts.

Q. Alright, you know from correspondence and your recollection that you did?

A. I undoubtedly did or I wouldn't have sent that letter.

Q. And you did receive altogether $10,000.00 from the sale of 20,000 shares to Jones Brokerage?

A. I myself?

Q. Yes, you, that you received from J. E. Jones Brokerage Company?

A. No. Yes, came in and was disbursed in accordance with the letters that you have here.

Q. And 10¢ per share went to the credit of A. C. Frost & Company for the purchase of that stock under the option [fol. 240] contract?

A. 10¢ per share went to the company for the purchase of stock.

Q. And the company credited to A. C. Frost & Company?

A. Never credited. Just purchased from the company at 10¢ a share. I don't think you will find any credit in regard to him for that. I didn't direct any such entry any way.

Q. And 80,000 shares of this optioned stock was sold to E. J. Gibson Company on or about May 9th, 1934, was it not—or was sold?

A. If the figures was 80,000 shares, yes. Now Gibson came in to me—you ask for my recollection?

Q. I am asking if it was sold?

A. You are asking for my recollection. There was a block of stock sold to Gibson, I believe 80,000 shares but I haven't any independent recollection.

Q. Alright, whatever it was.

A. Yes.

Q. Then it was at 10¢ per share for every share sold to E. J. Gibson that went into the treasury of the Coeur d'Alene Mines Corporation under this option agreement?

A. It went into the treasury of the corporation, the Coeur d'Alene Mines Corporation for the purchase of the stock.

Q. Purchase of the stock that was sold?

A. Yes, sir.

Q. And the prices over and above that——

A. Yes.

Q. Over and above 10¢ a share——

[fol. 241] A. Yes.

Q. Were divided between you and A. C. Frost & Company, were they?

A. I got twenty-five percent of the price.

Q. You got twenty-five percent of the price?

A. Mr. Frost the balance. The total profits from Frost came out of that and $500.00 stayed there—$16,500.00.

Q. What were your total profits?

A. $5500.00.

Q. You got $5500.00? Now you continued throughout May and June and up to the 23rd of April to do business with A. C. Frost & Company under the option agreement did you not, Mr. Nuzum?

The Court: What year.

Mr. Potts:

Q. 1935? Did you answer the question?

A. I don't know what you mean by "doing business". If you ask me what business specifically, I will answer.

Q. I am asking you if you did not continue to do business with A. C. Frost & Company after April 23rd, 1935 in the sale and delivery of stock under that option agreement?

A. He paid $1000.00 sometime the latter part of April or sometime in May.

Q. After the letter of April 23rd, 1935?

A. Yes, he paid $1000.00.

Q. That was for the purchase price of 10,000 shares?

A. That was to enable me to meet the payroll.

Q. That is what you wanted it for?

A. He got 10,000 shares for that.

Q. It was according to the modification of the payments that you agreed on, wasn't it?

[fol. 242] A. That is all I got.

Q. Will you answer the question, please?

A. I don't know whether it was. I say I wanted to get all I could and I could only get $1000.00. Get me the modification and show it to me.

Q. Was that $1000.00 paid on April 26th, 1935 paid under the modification of April 12th, 1935 as agreed to by Mr. Frost under date of April 25th, 1935?

A. Well, this, I see,—I had given him a modification under date of April 12th, which made the payments on or before April 15th; June 5th, July 10th, August 10th——

Q. Confine yourself to the question, please?

Q. And this is all changed and he—which he says that he wants a change and I don't remember whether I ever agreed to that change or not. I believe I remember now I wrote that. That was in accordance with my talk with him.

Q. That $1000.00 was that payment to be made in April 1935?

A. April 15th—when was it made?

Q. April 26th.

A. Well, I wouldn't say it was in accordance with the extension. I took the $1000.00 because I had to meet the payroll.

Q. I am asking if it wasn't that payment that went in in accordance with the extension?

A. I say it was in violation of that agreed extension itself. Not in accordance with the extension.

Q. In this letter of April 25th, 1935 after stating that the first three installments be changed to read as follows: "on or before April 27, 1935, $1000.00" which immediately [fol. 243] changed the date of that payment from April 15th, 1935 as set forth in your letter of April 12th to April 27th, 1935, and Mr. Frost said "you are authorized to use the enclosed bank draft for $1000.00 in payment of the first installment for which please send us a certificate for 10,000 shares". Now, I will ask you to look at plaintiff's exhibit No. 30 and I will ask you whether or not you didn't accept that bank draft which Mr. Frost enclosed in his letter of the 25th and used it?

A. No, you have that all wrong. That is June 14th. That is where I sent him $1500.00.

Q. I thought I had those letters arranged together. Here is the letter I thought I was handing you. Is the letter dated April 26th, 1935?

Mr. Wayne: Exhibit No. 13, isn't it.

A. I didn't send that letter.

Mr. Potts:

Q. Well, it was sent by your corporation, wasn't it?

A. Sent by them—F. Coffeen, Secretary.

Q. Secretary of the corporation.

A. Yes.

Q. Do you know that the corporation didn't receive that draft for $1000.00, accepted it and used it?

A. "Herewith certificate No. 690 for 10,000 shares of stock issued in name of A. C. Frost & Company to cover the draft for $1000.00 received today". That explains the whole thing.

Q. The corporation received the draft?

A. I don't think, Mr. Wayne—or Mr. Potts, if that letter was called to my attention, I didn't discuss the difference [fol. 244] in the change in the dates because, you see, that money was—was supposed to be there the 15th.

Q. We are not interested in that?

A. That draft came and we had to use it.

Q. You did use it?

A. We had to use it. It was to have been there the 15th.

Q. It wasn't to have been there the 15th in that letter.

A. Like it says—says the 12th of April and it was there the 15th—that is when it was to be there.

The Court: The letter speaks for itself.

Mr. Potts: Yes, the letter says it was to be there the 27th.

Witness: (A.) Get me that letter. That is not when it was to be there. You have got it there. The letter I wrote.

Q. No, we will not spend any more time on it.

A. I don't want to make any wrong statement.

Q. You did make that statement and the exhibit is in evidence that the payment was to be made on April 27th.

A. Will you get the letter.

Mr. Wayne: No, that isn't the fact.

Mr. Potts: What is the fact?

Mr. Wayne: According to the Frost letter provided they wrote him another letter.

Mr. Potts: They accepted the draft under those conditions.

Witness: (A.) You have the letter. Haven't you got the exhibit there.

The Court: Oh, it doesn't matter or make any difference. They accepted the draft and that is sufficient.

Mr. Potts: A draft of $1000.00 accompanied this letter.

[fol. 245] A. I am asking for the modification agreement, Mr. Potts. You know what I am asking for.

Q. Certainly I know what you are asking for.

A. Let me see it.

Q. And that said April 15th.

A. On or about April 15, 1935, $1000.00, and I said it wasn't sent until the 27th.

Q. And this letter——

A. Sent that letter there.

Q. This letter from Frost, plaintiff's exhibit No. 12 changed that date to April 27, 1935 enclosing the draft.

A. Yes.

Q. With the understanding you could use that draft if you agreed to that?

A. Yes.

Q. And you used the draft?

A. We used the draft. That was just an example of how he kept his agreement.

Mr. Potts: I move that the voluntary statement be stricken out.

The Court: It may be stricken.

Mr. Potts:

Q. Now I ask you whether or not after this letter of (strike that please). You had made a number of sales of this treasury stock covering the Boland Option before this letter of April 23, 1935, plaintiff's exhibit No. 50 was written, hadn't you?

A. Well now, I assume I had, but I have no independent recollection.

Q. You know you had, don't you—you know you made a number—you made a large number of them?

[fol. 246] A. I know I tried to sell or either sold, but that

the books will show if I sold anything. We tried to sell the stock because I had to do it.

Q. You claim that letter made no difference in the option agreement held by A. C. Frost & Company at that time?

A. The letter speaks for itself.

Q. You claim that made no difference?

A. I claim that he said on account of the market conditions the Coeur d'Alene Mines Company could make a deal with its treasury stock, as we saw fit. It did make a difference in my action, but that is for the court to say.

Q. In your judgment did he surrender the option by that letter?

A. I had to sell the stock as I saw fit.

Q. Did you construe that letter as surrend-ing the option?

A. I think one time that is what we did contend about the 100,000 shares to Gibson. I didn't want to give him a profit on that. He threatened to sue the company and I put it up to the trustees.

Q. You construed this letter as a surrender of the option by Frost?

A. I thought Frost was to have nothing further to do with selling of the treasury stock.

Q. Had nothing further to do with it? Had no further right to it?

A. He wasn't to sell treasury stock any further. I assume, your Honor—I didn't think he was entitled to any more of the profits out of it.

Q. Didn't think he had any more rights under the option [fol. 247] then?

A. No.

Q. Was that your position from that time on?

Mr. Wayne: He answered.

A. Well, that question didn't come up until we had an argument there about the profits of the Gibson stock.

Mr. Potts:

Q. Well, that came up very soon—along about May 11th, didn't it?

A. Yes, came up then, and then is when I expressed to him my opinion he had no rights to those profits.

Q. Why?

A. Because he had not kept his contract and because he acknowledged he couldn't keep his contract and couldn't make the payments.

Q. Because of this letter of April 23rd?

A. That letter of April giving me the right to sell.

Letter, R. W. Nuzum to W. J. Boland, dated June 12, 1935, marked Plaintiff's Exhibit No. 97 for identification.

Mr. Potts: I hand you a paper marked plaintiff's exhibit No. 97 purporting to be signed by R. W. Nuzum, I will ask you to state whether or not that is your signature?

A. Yes, sir.

Q. You wrote that letter? (Witness looks at letter.)

A. I undoubtedly did. Written to W. J. Boland.

Mr. Potts: We offer in evidence plaintiff's exhibit No. 97. (Hands to counsel.)

Mr. Wayne: Objected to as immaterial.

The Court: It will be admitted.

[fol. 248] Plaintiff's Exhibit No. 97 admitted in evidence.

Mr. Potts:

Q. When this Gibson stock was sold, Mr. Frost called you from Vancouver, Washington, did he not?

A. No.

Q. Didn't he call you directing you to deliver that stock?

A. No. You want to know how it occur-ed?

Q. You have answered the question.

A. He didn't call me from Vancouver at all about the Gibson stock.

Q. Alright. You mentioned money in connection with that letter, the one letter that was mailed, 1935, referring to the reimbursement out of the proceeds of this stock of the money loaned by Nuzum & Nuzum.

A. Yes.

Q. You say that Nuzum & Nuzum had loaned $7000.00 on their notes?

A. Yes, and the vouchers are there with the papers. Out of that much money—we did more than that, Mr. Potts.

Q. Just confine yourself to the question. Something over $2000.00 of that $7000.00 was interest, wasn't it which was paid to you?

A. No. $7000.00 interest at seven per cent, if you read that.

Q. You were paid over $2000.00 on one date?
A. I don't know. The loan ran over a long time. They had the money from '29 on.

Mr. Wayne: I submit, if Your Honor please, this is not a [fol. 249] matter of controversy here.
Mr. Potts: That is all.

Redirect examination.

Mr. Wayne:

Q. Mr. Nuzum, to what extent did you participate in the profits of the sale of treasury stock in the defendant corporation?
A. None.
Q. Well, you got a commission on this 100,000 shares that you sold, did you?
A. Well, that profit was to come from Frost. If I hadn't taken any of that, under the agreement he would have taken it all. That was his money and Mr. Frost gave the money to me outside the money that he retained out of the Jones collection.
Q. To what extent did you take the profits?
A. My recollection is $5500.00. Now, it may be less than that.
Q. Now did you ever, afterwards, participate in any profits on some of the treasury stock?
A. No.
Q. Mr. Nuzum, when did you individually or as president of the corporation—Coeur d'Alene Mines Corporation, first ascertain that A. C. Frost & Company had been dissolved as a corporation?

Mr. Potts: Objected to as immaterial and incompetent.
The Court: Overruled.

A. Well, what was the date—I can't remember those dates. What is the date of that notice of cancellation?

Mr. Potts: March 11th.
[fol. 250] Mr. Wayne: March 11, I think, or the 12th.

A. Now, gentlemen, I was sick and I got Graves, Kizer and Graves to take up the legal end of this I think in February. I judge from that date, about March 11th. I don't know how I came to do it but I requested them to ascertain

whether A. C. Frost & Company was a corporation. I just had a hunch he hadn't paid his fees. I didn't ask time—I didn't try to get time——

Mr. Potts: We object and move that the answer be stricken out. The witness should be instructed to confine his answer to the questions.

The Court: It may be stricken. Just confine your answer.

A. It wasn't to exceed two weeks prior to the date of that cancellation that I first learned of it.

Mr. Wayne:

Q. Then it was approximately the date of this forfeiture?

A. I knew at that time it was either shortly before that time I got word.

Mr. Wayne: Defendant now wants to offer exhibits 52, 53, 54 and 96. 52 and 53 are the Bunker Hill Extension Mines contracts with Mr. Frost and 54 is minutes of the meeting, I believe.

Mr. Hull: Minutes of May 9th, 1936?

Mr. Wayne: 96, and 96-A—has two relating matters—52 and 53.

Mr. Potts: No objection to them,

The Court: They will be admitted.

Defendant's Exhibits No. 52 and 53 admitted in evidence.

Mr. Wayne: I withdraw that offer because it has been admitted as part of 92.

[fol. 251] Mr. Wayne: Now, 96, 96-A and 96-B we offer. They exhibits by which the witness fixed the time.

Mr. Potts: Well, those exhibits, 96, 96-A and 96-B we object to them as immaterial because they were referred to in connection with that letter of April 23rd whereas the first one bears date of April 30, 1935.

Mr. Wayne: Yes, but the witness said the purpose of his going there to see him is that he seen the internal revenue collector to get his taxes attended to first and then went to Seattle to see Mr. Frost and admitted getting the money from him.

The Court: That was only for the purpose of fixing the date.

Mr. Wayne: Fixing the date and also the purpose of showing the indebtedness of the company.

The Court: Well, that date went into the testimony and the record, didn't it?

Mr. Potts: Of course it is not important but it is entirely immaterial.

The Court: Sustain the objection.

Defendant's Exhibits No. 96, 96-A and 96-B rejected.

Mr. Wayne: That is all.

The Court: We will take ten minutes recess.

(Following recess the matter was again taken up.)

A. C. Frost having been previously duly sworn, recalled as a witness in his own behalf, testified as follows:

Direct examination (Rebuttal).

Mr. Potts:

Q. Mr. Frost, with reference to this letter of April 23, [fol. 252] 1935, which is Exhibit No. 50, signed by you, what is the fact as to whether or not Mr. Nuzum dictated that to your secretary, Miss Belknap?

Mr. Wayne: Objected to as repetition. Not proper rebuttal.

The Court: It has been gone into.

Mr. Potts: Gone into generally. Mr. Nuzum testified specifically he dictated that to Miss Belknap as to that particular stock.

Mr. Wayne: I withdraw the objection.

Mr. Potts: You may answer.

A. He didn't. It was dictated to Miss Lindberg, my stenographer at the time.

Q. What did Miss Belknap have to do with it, if anything?

A. After it was dictated I asked Mr. Nuzum to accompany me into Miss Belknap's office, our secretary's adjoining room, and I explained to her the request Mr. Nuzum made which was for the purpose of completing the application and asked her to witness it—to witness in her presence and signed this letter.

The Court: That was gone into.

Mr. Potts:

Q. Now, with respect to the conference in Spokane at the company's office or Nuzum's office, May 11, 1935, was Miss Coffeen present in Mr. Nuzum's private office while you and he had a conference, referring to those two letters?

A. Only while the letter was being dictated. Not in there before or after.

Q. Is it a fact you dictated the whole of each of those letters?

[fol. 253] A. No, Mr. Nuzum joine- me and it was jointly dictated.

Mr. Wayne: That was gone into on examination in chief. He doesn't help it by testifying to it.

The Court: Well, it is in the minutes. I think Miss Coffeen's testimony was to the effect they were in conference before she was called in to take dictation.

Mr. Potts:

Q. Is it a fact Mr. Frost that Mr. Nuzum at that conference on May 11, 1935, objected or suggested that the twenty-five percent of the profits of the sale of any treasury stock should go to the company and not to himself personally?

A. Not in the remotest possible way. He mentioned holding up the repayment of money that was due me or the proceeds.

Mr. Potts: That, of course, we can't go into that question. That is right—you have answered the question. Did he, in fact, demand twenty-five percent going on some other stock that you were selling of that same company?

A. He also asked twenty-five percent profit out of the market of Bunker Hill stock.

Q. And did you and he have some controversy or dissension over that?

A. I explained why he couldn't and that caused the animosity.

Q. Now, with reference to paying a note of yours at the Spokane and Eastern Trust Company, just whose debt was that?

A. Was accom-odation paper to help Judge Turner and [fol. 254] Nuzum out in a transaction where I lost over $19,000.00.

Q. With respect to the financial condition of the A. C. Frost & Company from January 1st, 1935 up to, say July 1st, 1935, did you state or is it a fact that the A. C. Frost & Company was in a desperate financial condition?

A. We had large demands on us. We were financing one firm in which we had $92,000.00. A Wisconsin mining concern, $25,000.00. Mines in the Coeur d'Alenes, three or four similar properties and then we had over $800,000.00 investment in Seattle—two subdivisions—Uplands and Bryant's cliff and taxes on that amounting to over $30,000.00 a year.

Q. Then what was the financial condition during that period as to being able to raise money?

A. Most pressing during April and May, 1935.

Q. And during the month of April, Mr. Frost, do you know what this stock was selling for?

A. Around twenty.

Mr. Potts: That is all.

Cross-examination.

Mr. Wayne:

Q. At this time counsel has been speaking of, there was also a number of substantial judgments outstanding against you, were there not?

Mr. Potts: Object to that question as not competent or material unless it is confined to A. C. Frost & Company.

Mr. Wayne: No, as a joint party and you introduced the resolution and trust agreement here in which he said all his operations were for A. C. Frost & Company.

The Court: Answer the question.

Witness: (A.) Answer the question?

[fol. 255] The Court: Yes.

A. I didn't——

The Court: Yes or no—you need not elaborate.

Witness: (A.) Pardon?

The Court: You can answer yes or no, can't you?

A. There were judgments outstanding against me, I think two.

Mr. Wayne:

—. They were against A. C. Frost & Company?

A. They were not.

Q. They were obligations—on obligations of A. C. Frost & Company?

A. They were not.

Q. Yours personally?

A. They were transactions way back when I was operating on a large scale involving several million dollar transactions.

Q. They were judgments against you personally.

A. Judgments against me personally because I never had a partner except in the case of A. C. Frost & Company in Seattle.

Q. You say now A. C. Frost & Company had no connection with these judgments?

A. No connection with it whatsoever.

Mr. Wayne: That is all.

Mr. Potts: We rest.

The Court: What is the wish of counsel?

[fol. 256] Reporter's certificate to foregoing transcript omitted in printing.

[fol. 257] IN DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

A. C. FROST & COMPANY, a corporation, Plaintiff,

vs.

COEUR D'ALENE MINES CORPORATION, a corporation, Defendant

COMPLAINT—Filed March 26, 1937

Plaintiff complains of the defendant, and for cause of action alleges:

I

That at all the times hereinafter mentioned the plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its office and principal place of business in the City

of Seattle, King County, State of Washington, and at all such times was and now is engaged in business in the State of Washington and has not been doing business in the State of Idaho at any time.

II

That at all the times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, with its registered office in the City of Coeur d'Alene, County of Kootenai, State of Idaho, which City is designated in its Articles of Incorporation as the place where the principal business of said corporation is to be transacted. Defendant established and has maintained a branch office in the City of Spokane, State of Washington, and the principal business [fol. 258] of the defendant has been transacted at said branch office at all the times hereinafter mentioned.

III

That on or about the 10th day of September, A. D. 1934, at the City of Spokane in the State of Washington, the defendant entered into a contract in writing with one W. J. Boland of Toronto, Province of Ontario, Dominion of Canada, wherein the defendant represented (among other things) that the authorized capital stock of the defendant consisted of Three Million (3,000,000) shares of the par value of One ($1.00) Dollar per share; that of that stock there remained in the treasury One Million Three Hundred Thousand (1,300,000) shares free from lien, encumbrance or contract of any kind; and that the defendant was authorized to sell and deliver said 1,300,000 shares of treasury stock upon such terms as it might deem proper; and wherein the defendant, in consideration of the payment of the sum of Twenty-five Hundred ($2500) Dollars by the said W. J. Boland, did grant unto the said W. J. Boland the sole and exclusive right and option to purchase the whole or any part of said 1,300,000 shares of treasury stock of the defendant at the price of ten (10¢) Cents per share, payable as follows: $2500 on the signing of said option; $2500 on October 10, 1934; $2500 on November 10, 1934; $2500 on December 10, 1934; $10,000 on January 10, 1935; and $10,000 on the tenth of each month thereafter until the full purchase price of $130,000 is paid.

In said contract it was further agreed between the defendant and the said W. J. Boland that if the financial conditions during the months of January, February, March and April, 1935, are such as to make it difficult to finance 100,000 [fol. 259] shares of said stock each month, that the payment of $3500 for 35,000 shares of said stock during the months of January, February, March and April, 1935, shall meet the requirements of said option.

In said contract it was further agreed between the defendant and the said W. J. Boland that in the event the said W. J. Boland fails to exercise in full the option as therein provided, and purchase the stock as therein provided, and make the payments as therein provided on the dates therein set forth, said option shall on ten days' written notice, given by the defendant to the said W. J. Boland, terminate; and the rights or obligations of the said W. J. Boland under said option shall likewise terminate and he shall be entitled only to the stock which has been paid for, and there shall be no liability on the part of the said W. J. Boland for failure to exercise said option as therein provided.

A copy of said contract in writing is hereto attached, marked Exhibit "A", and made a part hereof as fully and to the same extent as if set forth herein at length.

IV

That thereafter, and on or about the 10th day of September, A. D. 1934, the said W. J. Boland, the party of the second part, in said contract, for a valuable consideration, duly assigned, transferred and set over unto the plaintiff all his right, title and interest in and to said contract hereto attached, marked Exhibit "A", and all his right, title and interest to the shares of stock mentioned in said contract, by an assignment in writing bearing date of September 10, A. D. 1934, a copy of which is hereto attached, marked Exhibit "B", and made a part hereof as fully and to the same extent as if set forth herein at length.

[fol. 260] That by virtue of the assignment aforesaid the plaintiff succeeded to all the rights of the said W. J. Boland under said contract, marked Exhibit "A", and to the shares of stock therein mentioned, and the same vested in the plaintiff as assignee of the said W. J. Boland on or about the 10th day of September, 1934, with the knowledge and consent of the defendant. The defendant thereafter at all

times accepted the plaintiff as the assignee of the said W. J. Boland under said contract, marked Exhibit "A", and accepted said assignment as a valid assignment and transfer of all the rights of the said W. J. Boland under said contract to the plaintiff.

V

That thereafter and on or about the 26th day of April, 1935, plaintiff and defendant agreed in writing to modify said contract, Exhibit "A", with respect to the dates and amounts of the monthly payments to be made thereunder, and mutually agreed that the payment of $3500 due on April 10. 1935, and the payments of $10,000 each due on the tenth of each month thereafter until the full purchase price of $130,000 is paid, according to the terms of said contract, should be made on the dates and in the amounts as follows: on or before April 27, 1935, $1000; on or before May 10, 1935, $2000; on or before June 10, 1935, $2000; on or before July 10, 1935, $3500; on or before August 10, 1935, $3500; on or before September 10, 1935, $3500; on or before October 10, 1935, $3500; and at the rate of $5000 on or before the tenth day of each succeeding month until the remaining treasury shares, at the rate of 10¢ per share, shall have been taken up and paid for.

VI

[fol. 261] That thereafter and on or about the 15th day of May, 1935, plaintiff and defendant agreed in writing to modify said contract, Exhibit "A", as follows: plaintiff submitted to defendant an offer to modify said contract in a letter bearing date of May 11, 1935, in words and figures as follows:

Spokane, Washington, May 11, 1935.

Coeur d'Alene Mines Corporation
605 Columbia Building
Spokane, Washington

GENTLEMEN:

I am willing that the proceeds from the sale of the treasury stock after the sale of the next 20,000 shares shall be placed in the treasury for the purpose of meeting the following expenditures and disbursements:

First: The speedy development of the property and the purchase of the necessary equipment to accomplish it.

Second: The purchase of the Mineral Point Mine.

Third: Nuzum & Nuzum are to be reimbursed for all advances, with interest at 7% per annum, out of the funds now in the treasury.

Fourth: For the construction of a mill when it is mutually agreed it is advisable, but said construction must be decided upon within six months from this date unless the time for the construction of said mill is further extended by mutual agreement to a definite time; and if said construc- is not so begun as herein agreed or a definite extension is not agreed upon, then said funds as are not yet [fol. 262] disbursed shall be made available to A. C. Frost & Company.

All credits over and above ten cents per share are to be placed to the credit of A. C. Frost & Company, with interest at six per cent per annum, to be reimbursed to us from the first earnings of the property.

As to the amounts realized from the proceeds of the sale of the treasury stock made by Mr. R. W. Nuzum, they are to remain in the treasury and the proceeds over and above ten cents per share shall be placed to the credit of A. C. Frost & Company.

Very truly yours, (sgd.) A. C. Frost & Company.
By A. C. Frost, Pres.

The defendant accepted the offer as set forth in said letter at a meeting of its Board of Directors held in Spokane, Washington, on May 15, 1935, at which meeting a motion was adopted that the proposition of the plaintiff, as set forth in said letter, be accepted, and in consideration thereof the defendant waive any claim it might have with reference to the contract, Exhibit "A", to W. J. Boland and by him assigned to plaintiff under date of September 10, 1934.

VII

That financial conditions were such as to make it difficult to finance 100,000 shares of said stock each month during the months of January, February, March and April, 1935, and defendant agreed to and did accept payments of $3500 for 35,000 shares of said stock during each of the months

of January, February and March, 1935, and agreed to and did accept a payment of $1000 for 10,000 shares of said [fol. 263] stock for the month of April 1935, in accordance with the modification of said contract, Exhibit "A", made on or about April 26, 1935, as hereinbefore alleged.

VIII

That plaintiff paid or caused to be paid to the defendant the payments provided in said contract, "Exhibit "A", as modified by said agreement of April 26, 1935, up to and including the payment for the month of June, 1935, and an amount sufficient to make the payments to become due in July and August, 1935, and was ready, willing and able to make all further payments as provided in said contract, Exhibit "A", and would have made such payments as they became due according to the terms of said contract, as modified, if it had not been prevented from so doing by the actions of the defendant, as hereinafter alleged. The payments so made by and on behalf of plaintiff, amounted to the sum of $35,500 and paid for 355,000 shares of said stock in accordance with the terms of said contract. Plaintiff fully performed what was required of it by virtue of said contract, Exhibit "A" and said modifications thereof, as the assignee of said W. J. Boland, until prevented from further performance by the defendant.

IX

That during the month of June, 1935, the defendant refused to perform said contract further, and refused to deliver any more of said stock to the plaintiff. The defendant renounced said contract at that time and refused to be longer bound thereby, and so notified plaintiff, and continuously thereafter repudiated its obligations under said contract and refused to deliver any of said stock to said plaintiff. After refusing to comply with the terms of said contract from the month of June, 1935, until the month [fol. 264] of March, 1936, the defendant on or about March 13th, 1936, served on plaintiff a pretended notice of the termination of said contract on the ground of failure in performance thereof by the plaintiff, although the plaintiff had fully performed said contract up to the time it was prevented from so doing by the defendant, and was at all times ready, willing and able to perform the same. Plaintiff has

elected to treat the renunciation of said contract by the defendant as a breach thereof, and to recover its damages therefor.

X

That at the time the defendant repudiated said contract, towit, in June, 1935, and refused to make further delivery of stock thereunder, there remained unsold 945,000 shares of said treasury stock. The market price of said shares of stock and the fair value thereof during the month of June, 1935, was from fifty (50¢) cents to sixty (60¢) cents per share. If the defendant had delivered said 945,000 shares of said stock in accordance with the terms of said contract, Exhibit "A", as modified, plaintiff would have made a profit in excess of $300,000. In consequence, plaintiff has been damaged in the sum of $300,000 by defendant's breach of said contract.

Second Cause of Action

For a second cause of action against the defendant plaintiff complains and alleges:

I

Plaintiff realleges and adopts Paragraphs I to VI, inclusive, of its First Cause of Action as a part of this, its Second Cause of Action, as fully and to the same extent as if set forth herein at length.

II

[fols. 265-266] That the defendant is indebted to the plaintiff in the sum of $8,100 Dollars, with interest thereon at the rate of Six (6%) per cent per annum from the 11th day of May, 1935, upon an account for moneys had and received from the proceeds of the sale of 90,000 shares of treasury stock, made by Mr. R. W. Nuzum at 19¢ per share, and received by the defendant under said contract, Exhibit "A", as modified by the agreement of May 15, 1935, for the use of plaintiff, no part of which has been paid, although plaintiff has demanded payment thereof.

Wherefore, plaintiff demands judgment against said defendant for the sum of $300,000 on its First Cause of Action, and for the sum of $8,100, with interest thereon at the rate

of 6% per annum from May 11, 1935, on its Second Cause of Action, and for its costs and disbursements herein expended.

H. J. Hull, Residence and Post Office Address: Wallace, Idaho, C. H. Potts, Residence and Post Office Address: Coeur d'Alene, Idaho, Attorneys for Plaintiff.

Duly sworn to by A. C. Frost. Jurat omitted in printing.

[fol. 267] EXHIBIT "A" TO COMPLAINT

This Agreement, made and entered into this tenth day of September, 1934, by and between Coeur d'Alene Mines Corporation, a corporation of the State of Idaho, authorized to do business in that state and to hold and own real property, having complied with the laws thereof, party of the first part, and W. J. Boland, of Toronto, Province of Ontario, Dominion of Canada, party of the second part, Witnesseth:

Party of the first part represents that the authorized capital stock of said first party consists of three million (3,000,000) shares of the par value of One dollar ($1.00) per share and is non-assessable. Of that stock there remains in the treasury One million three hundred thousand (1,300,000) shares free from lien, encumbrance or contract of any kind, and which the said party of the first part is authorized to sell and deliver upon such terms as it may deem proper.

Party of the first part represents that it owns the following six (6) unpatented mining claims: Willow, Diamond Point No. 2, Mineral Point Fraction, Alder, Maggie Fraction and Emma Extension, and that it has an option upon the Mineral Point Group, consisting of the "Mineral Point", which is a patented claim, and the following seven (7) unpatented lode mining claims:

"Columbia, Diamond Point, Australian, Maggie, Emma, Century and Commodore-Truxton,"

upon the following terms:

One Hundred thousand dollars ($100,000) payable on or before May 15, 1936, or the lesser sum of Seventy-five thousand dollars ($75,000), if paid on or before May 15, 1935. [fol. 268] Fifteen per cent (15%) of all net smelter re-

turns for ore shipped from the property are to be paid on account of the purchase price and credited thereon.

Party of the first part further represents that all the terms and conditions of said option have been performed and that said option is in full force and effect.

Party of the first part further represents that it also has an option to purchase the Lonesome Pine Group of six claims.

In consideration of the payment of Twenty-five hundred dollars ($2500.00) by party of the second part, receipt of which by party of first part is hereby acknowledged, party of the first part hereby grants unto the party of the second part the sole and exclusive right and option to purchase the whole or any part of said One million three hundred thousand (1,300,000) shares of treasury stock of Coeur d'Alene Mines Corporation at the price of ten cents (10¢) per share, payable as follows:

Twenty-five hundred dollars ($2500.00) on the signing of this option;

Twenty-five hundred dollars ($2500.00) on October 10, 1934;

Twenty-five hundred dollars ($2500.00) on November 10, 1934;

Twenty-five hundred dollars ($2500.00) on December 10, 1934;

Ten thousand dollars ($10,000.00) on January 10, 1935; and

Ten thousand dollars ($10,000.00) on the tenth of each [fol. 269] month thereafter until the full purchase price of One hundred thirty thousand ($130,000.00) dollars is paid.

It is hereby agreed that if the financial conditions during the months of January, February, March and April, 1935 are such as to make it difficult to finance One hundred thousand (100,000) shares of said stock each month, that the payment of Thirty-five hundred dollars ($3500.00) for thirty-five thousand (35,000) shares of said stock during the months of January, February, March and April, 1935 shall meet the requirements of this option.

All of such stock shall be issued to party of the second part or his nominee as paid for, and shall be issued fully paid and non-assessable. Voting rights shall attach only to stock issued and paid for.

The proceeds from the sale of said treasury stock shall be used solely for actual expenditures in carrying on the development and equipment of Mineral Point Mine, except when payments are made in the sum of Ten thousand dollars ($10,000.00) per month the party of the first part may have the right, if it is necessary, to use ten per cent (10%) of said payments in satisfaction of debts now owed by the company which do not exceed Nine thousand ($9,000.00) dollars. No salaries shall be paid officers or directors of said corporation out of said funds.

In consideration of said payment of Twenty-five hundred dollars ($2500.00) party of the first part also hereby grants unto party of the second part the right to purchase Two hundred thousand (200,000) shares of the private stock of said corporation, now issued, for the price of twenty- [fol. 270] five cents (25¢) per share, the said party of the second part having the right to call for said two hundred thousand (200,000) shares of private stock at twenty-five cents (25¢) per share at the time the One million three hundred thousand (1,300,000) shares of treasury stock are taken up and paid for by said party of the second part; all of said stock to be transferred to party of the second part or to his nominee fully paid and non-assessable. Certificates representing said Two hundred thousand (200,000) shares of stock shall upon written request of the party of the second part be deposited by party of the first part with the First National Bank of Wallace, Idaho, with appropriate instructions in writing to deliver same to the party of the second part upon said party of the second part making the payments as herein provided. In the event party of the second part does not proceed with the option to purchase said One million three hundred thousand (1,300,000) shares of treasury stock and either abandons or forfeits the same, this option with reference to the purchase of said private stock shall be at an end.

Party of the first part grants unto party of the second part, his nominee, representative or engineer, the right to inspect and examine said mine and mine operations and to furnish said party of the second part, his nominee, representative or engineer with all information and assistance in examining the property or properties of said corporation, and party of the second part, his nominee, representative or engineer, may take such samples therefrom as he desires

and shall have access to all the property, maps, records and books of said corporation during the period that this option is in force.

In the event party of the second part shall undertake to [fol. 271] purchase said treasury stock, and it becomes necessary to make any payments due on the bonds or any thereof, including any commission paid to Fred Fudge, and party of the second part shall advance said sums or cause the same to be advanced by any other person or persons or corporation, all such advances so made by the party of the second part, or any other person or persons or corporation, shall be paid back to the party of the second part out of the operations of the property before any dividends are declared, and all such advances shall be a charge against all the property of the corporation, including the property so acquired, and shall be a lien upon all such property; provided, however, that any such debt or lien created by any payment shall run five (5) years from the date of such payment and shall not be foreclosed until five years from the date of any such payment. In this respect, each payment is to represent a separate lien or debt, if made on different dates. All such advances are to bear interest at the rate of six per cent (6%) per annum.

In the event the party of the second part fails to exercise in full the option as herein provided, and purchase the stock as herein provided, and make the payments as herein provided on the dates herein set forth, this option shall on ten days' written notice, given by the party of the first part to the party of the second part, terminate; and the rights and obligations of the party of the second part under this agreement shall likewise terminate, and he shall be entitled only to the stock which has been paid for, and there shall be no liability on the part of the party of the second part for failure to exercise said option as herein provided.

[fol. 272] In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

Coeur d'Alene Mines Corporation, by "R. W. Nuzum," President, Party of the First Part. (Seal.) "W. J. Boland," Party of the Second Part. (Seal.)

Attest: "F. E. Coffeen," Secretary.

[fol. 273] EXHIBIT "B" TO COMPLAINT

This Indenture made in duplicate the 10th day of September, A. D. 1934.

Between: W. J. Boland, of the City of Toronto, Province of Ontario, Dominion of Canada, hereinafter called the Assignor of the First part and A. C. Frost & Company, of the City of Seattle, State of Washington, U. S. A., hereinafter called the Assignee of the Second Part.

Whereas by option agreement dated the 10th of September, A. D. 1934, Coeur d'Alene Mines Corporation, a corporation of the State of Idaho, did by agreement in writing grant unto the Assignor the right or option to purchase 1,300,000 shares of the capital stock of Coeur D'Alene Mines Corporation at ten cents (10¢) per share and a further option on an additional 200,000 shares of what is called private stock of the said Corporation at twenty-five cents (25¢) per share to be payable as is set forth in the said option agreement executed by Coeur d'Alene Mines Corporation, a copy of which is attached hereto.

And Whereas in arranging the said option the Assignor was acting as Trustee for and on behalf of the Assignee and at the request of the Assignee and in consideration of the sum of One dollar ($1.00) paid by the Assignee to the Assignor, the Assignor has agreed to execute and does execute this indenture for the purpose of transferring the said option to the said Assignee.

Now Therefore in Consideration of said premises as aforesaid the said Assignor does hereby assign, transfer and set over unto the said Assignee, A. C. Frost & Company, aforesaid all the right, title and interest of the said Assignor in the said option agreement of the 10th of September, A. D. [fol. 274] 1934, from Coeur d'Alene Mines Corporation above in part set forth and which is more fully set forth in the copy of the said option agreement annexed hereto and which is made a part of this assignment of the said option and the said shares and all right, title and interest therein and thereto so that the same shall be absolutely vested in the said Assignee aforesaid the same as if the said Assignee had been named in the said option agreement in the place and stead of W. J. Boland, the said Assignor, and the said Assignor hereby covenants and agrees with the said Assignee that the said W. J. Boland or his heirs, executors and administrators will at all times execute any and all

indentures that may be necessary or require- so as to vest the said option agreement and all benefits to be derived therefrom in the said A. C. Frost & Company, the Assignee above mentioned.

In Witness Whereof the said Assignor has hereunto set his hand and seal the 10th day of September, A. D. 1934.

"W. J. Boland." (Seal.)

Signed, sealed and delivered in the presence of "G. Nightingale".

[File endorsement omitted.]

[fol. 275] IN DISTRICT COURT OF KOOTENAI COUNTY

SUMMONS AND RETURN—Filed March 30, 1937

(The Sheriff of Shoshone County, Wallace, Idaho, Received Mar 27 1937 at 9:30 A. M. F. L. N.)

The State of Idaho sends greetings to the above named defendant:

You are hereby notified that a Complaint has been filed against you in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, by the above named plaintiff, a copy of which is served herewith.

You are hereby directed to appear and plead to the said complaint within Twenty (20) days of the service of this Summons, and

You are further notified that unless you so appear and plead to said Complaint within the time herein specified, the plaintiff will take judgment against you as prayed in said Complaint.

Witness my hand and the seal of said District Court this 26th day of March, A. D. 1937.

Jas. A. Foster, Clerk. Jos. C. White, Deputy.
(Court Seal.)

H. J. Hull, Residence and Post Office Address: Wallace, Idaho; C. H. Potts, Residence and Post Office Address: Coeur d'Alene, Idaho, Attorneys for plaintiff.

[fol. 276] RETURN ON SUMMONS

SHERIFF'S OFFICE,
County of Shoshone,
State of Idaho, ss:

I, Fred C. May, Sheriff of the County of Shoshone, State of Idaho, do hereby certify and return that I received the within and hereunto annexed Summons on the 27th day of March, A. D. 1937, and personally served the same upon the Coeur d'Alene Mines Corporation, a corporation, by delivering to and leaving with Dr. Herbert C. Mowery, President, in person, in the City of Wallace, County of Shoshone, State of Idaho, on the 27th day of March, A. D. 1937, a true and correct copy of said Summons, attached to which was a copy of the Complaint referred to in said Summons.

Dated this 27th day of March, A. D. 1937.

Fred C. May, Sheriff, by F. L. Nelson, Deputy.

[File endorsement omitted.]

[fol. 277] IN DISTRICT COURT OF KOOTENAI COUNTY

DEMAND FOR SECURITY FOR COSTS—Filed April 8, 1937

To the Plaintiff Above Named and to Messrs. H. J. Hull and C. H. Potts, Attorneys for said Plaintiff:

You and each of you will please take notice that the defendant in the above entitled action hereby demands security for the costs and charges which may be awarded against such plaintiff, for the reason and upon the ground that the plaintiff resides out of the State of Idaho, and said plaintiff is a foreign corporation, which facts appear upon the face of the complaint herein, to which complaint reference is hereby made.

James A. Wayne, Residence and Post Office address Wallace, Idaho.

Service of the within and foregoing demand for security for costs is hereby admitted this 7th day of April, 1937.

C. H. Potts, H. J. Hull, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 278] IN DISTRICT COURT OF KOOTENAI COUNTY

DEMURRER—Filed April 8, 1937

Comes now the defendant above named and demurs to the plaintiff's complaint herein, and for grounds of demurrer alleges that the said complaint does not state facts sufficient to constitute a cause of action.

James A. Wayne, Residence and Post Office address Wallace, Idaho.

Service of the within and foregoing demurrer is hereby admitted this 7th day of April, 1937.

C. H. Potts, Attorney for Plaintiff, H. J. Hull, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 279] Undertaking for Costs, filed May 15, 1937, omitted in printing.

[fol. 280] IN DISTRICT COURT OF KOOTENAI COUNTY

ORDER OVERRULING DEMURRER—Filed July 8, 1937

The demurrer of defendant to the complaint of the plaintiff herein came regularly on to be heard on the 8th day of July, 1937. Messrs. H. J. Hull and C. H. Potts appeared as attorneys for the plaintiff and Mr. James A. Wayne appeared as attorney for the defendant. The demurrer was submitted without argument, and the court being fully advised in the premises, it is now

Ordered that said demurrer be, and the same hereby is, overruled, and the defendant granted until the 1st day of August, 1937, within which to answer the complaint herein.

Dated at Coeur d'Alene, Idaho, this 8th day of July, A. D. 1937.

Bert A. Reed, Judge.

[File endorsement omitted.]

[fol. 281] IN DISTRICT COURT OF KOOTENAI COUNTY

ANSWER—Filed July 30, 1937

Comes now the defendant in the above entitled action and for its answer to the plaintiff's complaint herein admits, denies, qualifies and alleges as follows:

I

Denies that at all the times mentioned in said complaint the plaintiff was, or that it now is, a corporation organized and/or existing under and/or by virtue of the laws of the State of Washington, or that it has its office or its principal place of business, or any office or place of business in the City of Seattle, King County, State of Washington, or that it now is, or at any of the times mentioned in said complaint was, engaged in business in the State of Washington, and denies that said plaintiff has not been doing business in the State of Idaho at any time.

Further answering said paragraph I defendant alleges that plaintiff was organized as a corporation under the laws of the State of Washington on September 8, 1924, and that its Articles of Incorporation are recorded in the office of the Secretary of State of said State of Washington in Book 137 at page 10-11 thereof of Domestic Corporations; that on June 1, 1931, the plaintiff corporation was stricken from the records of the office of the Secretary of State of the State of Washington and that the following is a true and correct copy of the entry made with reference to said striking: "Stricken from records July 1, 1931"; that thereafter and on July 1, 1934, the plaintiff corporation was dissolved by order of the Secretary of State of the State of Washington, and the following is a true and correct copy of the entry made on the books of the Secretary of State and the order entered therein: "Stricken from [fol. 282] the records and dissolved July 1, 1934, Chap. 144, L. 1923."

Further answering paragraph I of said complaint the defendant alleges that Chapter 144 of the Laws of 1923 of the State of Washington was in force and effect at all times after the 1st day of May, 1923 and July 1, 1934, and long after said last mentioned date, and during all of the time between the organization of the plaintiff corporation on September 8, 1924, and its dissolution on July 1, 1934;

that under said Laws of Washington every domestic corporation is required to pay an annual license fee to the Secretary of State of the State of Washington for each year beginning on July 1st and ending on June 30th, and that in the event any such domestic corporation shall fail to pay such annual license fee within the time provided by law, that is to say on or before July 1st of each year, the Secretary of State is required under the laws of said State of Washington to strike the name of such corporation from the records in his office and to enter upon said records the statement "Stricken from records July 1" and adding the year, for the nonpayment of its license fees in which such corporation is stricken; that thereafter under the Laws of the State of Washington any corporation is permitted to reinstate its charter and its right to do business within said State of Washington by paying the amount of all license fees as to which it is in arrears within three years next following the date in which it was stricken from the records in the office of the Secretary of State, but that under the Laws of the State of Washington, and particularly under Section 3846 of Remington's Revised Statutes of said State of Washington, which statute was in effect at all of the times [fol. 283] herein mentioned, in the event any corporation the name of which has been stricken from the records in the office of the Secretary of State fails to reinstate itself and its charter within the aforesaid period of one year, said corporation becomes dissolved and cannot thereafter be reinstated; said Section 3846 of Remington's Revised Statutes of the State of Washington is as follows:

"Dissolution for non-payment.—If, however, within the period named within which a corporation may make application to be reinstated, such corporation shall not have made such application, the Secretary of State shall enter upon his records a notation that said corporation is dissolved, and it shall thereupon be dissolved, and the trustees of the corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings."

And defendant alleges that the plaintiff corporation was stricken from the records in the office of the Secretary of State of the State of Washington on July 1, 1931; that it failed within a period of three years to make application to

be reinstated, and was thereupon and on July 1, 1934, dissolved, and that it has never been reinstated.

And further answering said paragraph I defendant alleges that at all of the times herein mentioned there was in force and effect in the State of Washington a provision of its Constitution, being Article II, Section 28, Sub. 9, providing as follows, to-wit:

"The Legislature is prohibited from enacting any private or special law in the following cases:

[fol. 284] " " " (From) giving effect to invalid deeds, wills or other instruments."

And further answering said paragraph I of said complaint defendant alleges that the plaintiff never at any time complied with the laws of the State of Idaho with reference to foreign corporations doing business within said State; that nevertheless the plaintiff in violation of the laws of the State of Idaho did engage in doing business in this State, and particularly in entering into or attempting to enter into the contract mentioned in the complaint herein, and a copy of which is attached to said complaint; and defendant alleges that such contract or agreement, meaning the contract or agreement mentioned in said complaint and a copy of which is attached to said complaint, was and is void ab initio and cannot be sued upon or enforced in any court of this State by such corporation.

And defendant alleges in further answer to said paragraph I that the plaintiff has never existed as a corporation under the laws of the State of Washington since the 1st day of July, 1934, and has never at any time been authorized to do business within the State of Idaho, and that any contract or agreement made by it at any of the times mentioned in the complaint herein was and is absolutely null and void and cannot be sued upon or enforced in any court in this State.

II

Defendant admits that it is a corporation organized under and existing by virtue of the laws of the State of Idaho, and that at the date of the filing of the complaint herein its registered office was in Coeur d'Alene, Kootenai County, Idaho, but in this connection alleges that since the filing of said

complaint the principal place of business of the defendant [fol. 285] corporation has by an amendment to its Articles of Incorporation been changed to Wallace, Shoshone County, Idaho. Defendant denies that it ever maintained a branch office in Spokane, Washington, or that the principal business of the defendant has been transacted at said branch office, and alleges that in truth and in fact its principal business has always been transacted in Shoshone County, Idaho, and that the only office which it ever maintained in Spokane was for the convenient transfer of stock.

III

Defendant admits that on or about September 10, 1934, it caused an instrument, a copy of which, marked Exhibit "A" is attached to said complaint, to be executed by its president and secretary, and admits that said Exhibit "A" is a true and correct copy of said instrument, and that the terms and conditions of said instrument were as set forth therein; but defendant denies that said instrument ever at any time constituted or was an agreement or contract between the defendant and the said W. J. Boland, or the defendant and the plaintiff herein, or between the defendant and any other party or parties whomsoever, and in this connection alleges that said instrument was entered into in violation of law, and particularly in violation of an Act of the Congress of the United States, passed by the Seventy-Third Congress, and known as the Security Act of 1933, approved May 27, 1933, and Acts of Congress amendatory thereof and supplemental thereto, and particularly in this that the 1,300,000 shares of stock attempted to be sold by the defendant to the said W. J. Boland under said instrument was the treasury stock of the defendant corporation, and had never been registered for sale under [fol. 286] said National Securities Act, or Acts amendatory thereof or supplemental thereto, with the Securities and Exchange Commission, and that the said W. J. Boland knew these facts and knew that the defendant could not legally sell to him the said stock or any part thereof; and defendant alleges that said contract was void ab initio.

It is the intention of the defendant to admit the execution of the said instrument attached to said complaint as Exhibit "A", but to deny the construction placed upon said instrument by paragraph III of said complaint.

IV

Defendant denies that on September 10, 1934, or at any time, the said W. J. Boland, for a valuable consideration, or otherwise, assigned or transferred or set over unto the plaintiff all his right, title and interest in and to said alleged contract Exhibit "A", and all his right, title and interest to the shares of stock mentioned in said contract, and denies that the said Boland ever had any rights to assign under said pretended contract, and denies also that the plaintiff was ever legally qualified to accept and receive any assignment of said pretended contract, and in this connection alleges that on September 10, 1934, the said plaintiff had no existence as a corporation, having been permanently dissolved on the preceding July 1, 1934, as hereinbefore particularly alleged.

And in this connection, and in further answer to said paragraph IV this defendant alleges that in attempting to enter into said contract Exhibit "A" the said W. J. Boland was not acting for himself but was acting surreptitiously as trustee for A. C. Frost & Company, the plaintiff herein, for the reason that said A. C. Frost & Company [fol. 287] had been dissolved as a corporation and could not legally enter into any contract or agreement or instrument whatsoever, and in fact had no existence as a corporation; that the first notice this defendant had of the fact that said W. J. Boland had acted in entering into said agreement as trustee for A. C. Frost & Company was obtained from a letter written it by A. C. Frost, pretending to be president of A. C. Frost & Company, under date of December 12, 1934, and that it never had any knowledge of the fact that A. C. Frost & Company had been dissolved as a corporation until after the last payment was made under the said instrument Exhibit "A", as hereinafter alleged; defendant admits that a pretended assignment, a copy of which marked Exhibit "B" is attached to said complaint, was sent by the said A. C. Frost to this defendant with his said letter of December 12, 1934; denies that said assignment vested in plaintiff any right to any shares of stock mentioned in said instrument Exhibit "A", and denies that said pretended assignment was made with the knowledge or consent of the defendant, and denies that defendant accepted the plaintiff as the assignee of W. J. Boland under said contract; admits that it assumed said assignment to be a valid assign-

ment and transfer of the rights of W. J. Boland under said instrument, until it ascertained the true facts in regard to the plaintiff, which it did do shortly after May 9, 1936.

V

Answering paragraph V the defendant admits that the instrument Exhibit A was modified by changing certain payments so that there should be paid on or before April 27, 1935, $1,000, and on or before May 10, 1935, $2,000, and on or before June 10, 1935, $2,000; except as herein ex-
[fol. 288] pressly admitted defendant denies each and every allegation of said paragraph V.

Further answering said paragraph V this defendant alleges that the only payments ever made under said instrument Exhibit "A", and any modifications thereof, were as follows, to-wit:

September 10, 1934, W. J. Boland paid $2500.00 and received therefor 25,000 shares of treasury stock of the defendant corporation;

October 10, 1934, W. J. Boland paid $2500.00 and received therefor 25,000 shares of treasury stock of the defendant corporation;

November 10, 1934, W. J. Boland paid $2500.00 and received therefor 25,000 shares of treasury stock of the defendant corporation;

December 10, 1934, A. C. Frost & Co. paid $2500.00 and received therefor 25,000 shares of treasury stock of the defendant corporation;

January 16, 1935, A. C. Frost & Co. paid $3500.00 and received therefor 25,000 shares of treasury stock of the defendant corporation;

March 22, 1935, A. C. Frost & Co. paid $2000.00 and received therefor 25,000 shares of treasury stock of the defendant corporation;

April 26, 1935, A. C. Frost & Co. paid $1000.00 and received therefor 25,000 shares of treasury stock of the defendant corporation; that the total amount paid defendant by the said W. J. Boland and A. C. Frost & Company was the sum of $16,500, and that the defendant issued to said last mentioned parties 165,000 shares of its treasury stock in complete settlement for said payments, and that said parties accepted said 165,000 shares of stock in complete
[fol. 289] settlement and satisfaction for the payments which

they had made; and further answering said paragraph V defendant alleges that the plaintiff defaulted in making a payment of $2,000 falling due under said instrument Exhibit "A" as modified on May 10, 1935, and never at any time made any further payment or payments thereunder, and that thereupon the said plaintiff forfeited such rights, if any, as it ever had under said instrument Exhibit "A", because of its own breach of the conditions thereof, and particularly because of its failure to make the payment due thereunder on May 10, 1935, and its failure to make any further payments under said instrument Exhibit "A".

VI

Admits that under date of May 15, 1935, plaintiff submitted to defendant a letter, a copy of which is set forth in said paragraph VI, but denies that said letter proposed to modify said instrument Exhibit "A"; admits that defendant accepted said offer, and that defendant waived any breach of said instrument Exhibit "A" down to that date, that is to say May 11, 1935, except the requirement as to payments.

VII

Defendant admits that it accepted a payment of $3500 on January 16, 1935, for 35,000 shares of its stock, and $2000 on March 22, 1935, for 20,000 shares of its stock, and $1000 on April 26, 1935, for 10,000 shares of its stock, but except as herein expressly admitted defendant denies each and every allegation, matter and thing alleged in paragraph VII.

VIII

Defendant denies that plaintiff paid or caused to be paid to the defendant the payments provided in said Exhibit "A", or any modification of said Exhibit "A", up to and [fol. 290] including the payment for the month of June, 1935, and denies that plaintiff paid or caused to be paid defendant an amount sufficient to make the payments to become due in July and August, 1935, and alleges that in truth and in fact the said Boland and the said plaintiff paid, or caused to be paid to the defendant, only the payments hereinbefore and in paragraph V of this answer expressly admitted and alleged to have been made, and that no other payments whatsoever were made or caused to be made to the defendant by said parties, or either of them. Except as

herein expressly admitted, defendant denies each and every allegation, matter and thing set forth in said paragraph VIII of said complaint.

IX

Defendant denies each and every allegation, matter and thing set forth in paragraph IX of said complaint, save and except that it admits that it served on the plaintiff a notice of the forfeiture and termination of said instrument Exhibit "A", and any and every modification thereof, on or about March 13, 1936.

X

Defendant denies each and every allegation, matter and thing set forth and/or alleged in paragraph X of said complaint.

And for its answer to the second pretended cause of action attempted to be set up in said complaint this defendant admits, denies, and alleges as follows:

I

Defendant realleges and adopts paragraphs I to VI inclusive of its answer to the first pretended cause of action attempted to be set up in said complaint.

II

[fol. 291] Defendant denies each and every allegation, matter and thing set up and/or alleged in paragraph II of said pretended second cause of action.

Wherefore, defendant prays judgment that plaintiff take nothing by this action, that the same be dismissed, and that defendant recover its costs and disbursements herein.

James A. Wayne, Attorney for Defendant, Residence and Post Office Address Wallace, Idaho.

Duly sworn to by H. C. Mowery. Jurat omitted in printing.

Service of the within and foregoing answer is hereby admitted this 29th day of July, 1937.

C. H. Potts, H. J. Hull, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 292] IN DISTRICT COURT OF KOOTENAI COUNTY

DEMURRER TO ANSWER—Filed August 18, 1937

Plaintiff demurs to the several defenses set up in the defendant's answer on file herein as follows:

I

Plaintiff demurs to the first defense set up in the answer attempting to deny the corporate existence of plaintiff, to-wit: that portion of the answer beginning with the words "Further answering said paragraph I" in paragraph I of the Answer, in line 12 on page 1, and ending with the words "other instruments" in paragraph I in line 27 on page 3 of the answer, on the following grounds:

a. That said first defense does not state facts sufficient to constitute a defense or counterclaim.

b. That it appears on the face of the answer that the defendant is estopped to deny that plaintiff was a corporation at the time of the dealings between plaintiff and defendant as alleged in the complaint and admitted in the answer, and is estopped to deny plaintiff's corporate existence and capacity to sue in this action.

II

Plaintiff demurs to the second defense set up in the answer, alleging noncompliance by plaintiff with the laws of Idaho relating to foreign corporations doing business in this state, to-wit, that portion of the answer beginning with the words "And further answering said paragraph I of said complaint" in paragraph I in line 28 on page 3, and ending with the words "in this State." in paragraph I in line 10 on page 4 of the answer, on the ground that said second defense does not state facts sufficient to constitute a defense or counterclaim.

III

[fol. 293] Plaintiff demurs to the third defense set up in the answer, attempting to allege that the contract, Exhibit "A", attached to the complaint, was entered into in violation of law, to-wit, that portion of the answer beginning with the words "and in this connection" in paragraph III in line 2

on page 5, and ending with the words "void ab initio" in paragraph III in line 14 on page 5 of the answer, on the following grounds:

a. That said third defense does not state facts sufficient to constitute a defense or counterclaim.

b. That it appears on the face of the answer that the defendant is estopped to allege or claim that said contract was entered into in violation of law or in violation of the act of the Congress of the United States known as the Securities Act of 1933, and acts of Congress amendatory thereof and supplementary thereto.

IV

Plaintiff demurs to the fourth defense set up by paragraph IV of the answer on the following grounds:

a. That said fourth defense does not state facts sufficient to constitute a defense or counterclaim.

b. That it appears on the face of the answer that the defendant is estopped to deny or question the validity or legal effect of the assignment of the contract, Exhibit "A", by W. J. Boland to the plaintiff, and the corporate capacity of the plaintiff to accept and receive said assignment.

H. J. Hull, Residence and Post Office Address: Wallace, Idaho; C. H. Potts, Residence and Post Office Address: Coeur d'Alene, Idaho. Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 294] IN DISTRICT COURT OF KOOTENAI COUNTY

NOTICE OF HEARING DEMURRER TO ANSWER—Filed August 30, 1937

To the above named defendant and to James A. Wayne, attorney for defendant.

You are hereby notified that on the 30th day of August, A. D. 1937, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, in the courtroom of the above entitled Court at the Courthouse in the

City of Coeur d'Alene, Kootenai County, State of Idaho, the plaintiff will call up for hearing and disposition the Demurrer to Answer in said action, before the above entitled Court or the Honorable Bert A. Reed, one of the judges thereof.

Dated at Coeur d'Alene, Idaho, this 21st day of August, A. D. 1937.

H. J. Hull, Residence and Post Office Address: Wallace, Idaho; C. H. Potts, Residence and Post Office Address: Coeur d'Alene, Idaho. Attorneys for plaintiff.

Service of the foregoing notice and receipt of a copy thereof is acknowledged this 23rd day of August, 1937.

James A. Wayne, Attorney for Defendants.

[File endorsement omitted.]

[fol. 295] In District Court of Kootenai County

Affidavit of C. H. Potts—Filed August 30, 1937

State of Idaho,
County of Kootenai, ss:

C. H. Potts, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the plaintiff in the above entitled action; that in the opinion of counsel for the plaintiff the proposed amendment to be designated paragraph IA sets forth facts which are material to plaintiff's cause of action and which should be included in the complaint; that such amendment has been made necessary by an affirmative defense pleaded in the answer, in which the defendant has pleaded a portion of the laws of the State of Washington and has omitted to plead all the laws of said State relating to the question at issue; that it is necessary in furtherance of justice to amend the complaint so that it will contain the facts set forth in said proposed amendment; and that said proposed amendment does not change the cause of action.

C. H. Potts.

Duly verified.

[fol. 296] IN DISTRICT COURT OF KOOTENAI COUNTY

MOTION FOR LEAVE TO AMEND COMPLAINT—Filed August 30, 1937

Now comes the plaintiff in the above entitled action, and moves the Court for leave to amend its complaint in said action by adding immediately following paragraph I of the complaint, an amendment to be designated as paragraph IA, a copy of which amendment is hereto attached.

This motion is made and based upon the records and files in said action, the proposed amendment submitted herewith, and the affidavit of C. H. Potts served herewith.

H. J. Hull, Residence and Post Office Address: Wallace, Idaho; C. H. Potts, Residence and Post Office Address: Coeur d'Alene, Idaho. Attorneys for plaintiff.

[File endorsement omitted.]

[fol. 297] IN DISTRICT COURT OF KOOTENAI COUNTY

NOTICE OF MOTION FOR LEAVE TO AMEND COMPLAINT—Filed Aug. 30, 1937

To Coeur d'Alene Mines Corporation, a corporation, the above named defendant, and to Mr. James A. Wayne, attorney for defendant:

You, and each of you, are hereby notified that on the 30th day of August, A. D. 1937, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, in the courtroom of the above entitled court at the Courthouse in the City of Coeur d'Alene, Kootenai County, State of Idaho, the plaintiff will move the above entitled court for leave to amend its complaint in said action by adding immediately following paragraph I of the complaint, an amendment to be designated as paragraph IA, a copy of which amendment is served upon you herewith.

Said motion will be made and based upon the records and files in said action, upon the proposed amendment

submitted herewith, and upon the affidavit of C. H. Potts served herewith.

H. J. Hull, Residence and Post Office Address: Wallace, Idaho; C. H. Potts, Residence and Post Office Address: Coeur d'Alene, Idaho. Attorneys for plaintiff.

Copy of the within Notice of Motion for Leave to Amend Complaint, Motion for leave to Amend Complaint, affidavit, and proposed amendment received this 23rd day of August, A. D. 1937.

James A. Wayne, Attorney for Defendant.

[File endorsement omitted.]

[fol. 298] In District Court of Kootenai County

Order Allowing Amendment to Complaint

The motion of plaintiff for leave to amend its complaint in said action coming on regularly for hearing before the Court on this day, pursuant to notice heretofore given, and it appearing that said amendment is in furtherance of justice and should be allowed;

It is hereby ordered that leave be granted to the plaintiff, and that plaintiff be allowed to amend its complaint in said action by adding immediately following paragraph I of the complaint an amendment to be designated as paragraph IA, a copy of which amendment is hereto attached, marked "Amendment to Complaint", and made a part of this order.

It is further ordered that said amendment be filed in the office of the Clerk of this Court forthwith, and a copy thereof served on the defendant, and that said defendant have ten (10) days after service thereof to answer said amendment.

Done in open Court this 30th day of August, A. D. 1937.

Bert A. Reed, District Judge.

[fol. 299] IN DISTRICT COURT OF KOOTENAI COUNTY

AMENDMENT TO COMPLAINT—Filed Aug. 30, 1937

IA

That plaintiff was organized as a corporation under the laws of the State of Washington on September 8, 1924; that on July 1, 1931, it was stricken from the records of the office of the Secretary of State of the State of Washington for failure to pay its annual license fee under the laws of Washington; that on July 1, 1934, the Secretary of State of the State of Washington entered on his books a notation that plaintiff was "stricken from the records and dissolved July 1, 1934, Chap. 144, L. 1923"; that Chapter 144 of the Laws of 1923 of the State of Washington was in force and effect from and after midnight of June 6, 1923, until midnight of March 12, 1937; that Section 3846 of Remington's Revised Statutes of the State of Washington was in force and effect until midnight of March 12, 1937, and is as follows:

"Dissolution for nonpayment. If, however, within the period named within which a corporation may make application to be reinstated, such corporation shall not have made such application, the Secretary of State shall enter upon his records a notation that said corporation is dissolved, and it shall thereupon be dissolved, and the trustees of the corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings."

That at all times since midnight of the 12th day of March, 1937, Chapter 70 of the Laws of 1937 of the State of Washington has been, and now is, in force and effect; that Section 14 of said Chapter is as follows:

[fol. 300] "Sec. 14. In the event that any corporation shall allow license fees due the State under existing laws or by virtue of this chapter, to become delinquent for a period of three consecutive years and the secretary of state shall be unable to collect said fees in full, it shall be his duty to enter upon his records a notation that such corporation is dissolved and said corporation shall thereupon be dissolved and the secretary of state shall thereupon be

free to grant the name of the corporation so dissolved to any other corporation thereafter organized: Provided, however, That any corporation which may have been heretofore stricken or dissolved or which may hereafter be dissolved by the secretary of state for non-payment of fees under existing laws or this chapter is hereby given the privilege of becoming reinstated and having its corporate license restored by applying to the secretary of state for such reinstatement at any time within ten (10) years after such corporation may have been or may be stricken or dissolved, and paying to the secretary of state for the use of the state, all license fees and penalties due to the State under existing laws and this chapter and the additional sum of ten dollars ($10.00) for each and every year that its name has been stricken from, or noted as dissolved upon the records, or paying to the secretary of state for the use of the state the license fees and penalties due to the state under existing laws or this chapter and the penalty above provided for the most distant year then due and unpaid and also for the year last due and unpaid and enter into a contract with the secretary of state, according to a form to be approved by him, for the payment of all other unpaid [fol. 301] license fees and penalties then due from it, in ten (10) semi-annual installment payments, to begin upon the due date of the next annual license fee. The current annual license fee shall not be received unless the installment payments due have been paid: Provided, further, that the privilege of becoming reinstated shall not be granted to any corporation where the name of such corporation has been given to a new corporation organized after its dissolution.

"Upon reinstatement as herein provided it shall be the duty of the secretary of state to enter upon his records a notation that such corporation is reinstated, and it shall thereupon be reinstated as of the date on which its name was stricken from or noted as dissolved upon the records of the office of the secretary of state, and such corporation shall have the right to sue and shall enjoy the same rights and powers as if its name had never been stricken from the records or it had never been dissolved and all things done by it in the exercise of its corporate powers before such reinstatement shall become valid acts of the corporation."

That pursuant to said Chapter 70 of the Laws of 1937 of the State of Washington, the plaintiff, on March 15, 1937, was reinstated as a corporation as of July 1, 1934, and the Secretary of State of the State of Washington, on March 15, 1937, entered upon his records a notation that plaintiff was reinstated.

That the State of Washington recognizes the present corporate existence of the plaintiff, it having, on the 15th day of March, 1937, issued to plaintiff its annual license to do business for the year ending July 1, 1937, and having [fol. 302] reinstated the plaintiff on that date, and it having, on the 21st day of June, 1937, issued to plaintiff its annual license to do business for the year ending July 1, 1938, and said State not having questioned in any manner or at any time plaintiff's corporate existence.

That at all times since March 1, 1912, it has been, and now is, the law of the State of Washington, established by the Supreme Court of the State of Washington, that the dissolution of a corporation under Chapter 140 of the Laws of 1907 of the State of Washington, Chapter 19 of the Laws of the Extraordinary Session of 1909 of the State of Washington, Chapter 41 of the Laws of 1911 of the State of Washington, and Chapter 144 of the Laws of 1923 of the State of Washington (the same being included in Sections 3842 to 3846 inclusive of Remington's Revised Statutes of the State of Washington) and the entry by the Secretary of State of a notation that such corporation is dissolved, does not terminate the existence of such corporation or result in the forfeiture of its charter; that such corporation continues to exist until the State of Washington, in a proper proceeding in a proper court, procures an adjudication of forfeiture and enforces it.

That the aforesaid was held to be the law of the State of Washington by the Supreme Court of Washington in its decisions in the following cases:

State, ex rel. Preston Mill Co. v. Howell, 67 Wash. 377, 121 Pac. 861;

Jones v. Francis, 70 Wash. 676, 127 Pac. 307;

Eastman & Co. v. Watson, 72 Wash. 522, 130 Pac. 1144;

State, ex rel. New Arlington Hotel Co. v. Hinkle, 115 Wash. 298, 197 Pac. 4;

[fols. 303-308] Patterson v. Ford, 167 Wash. 121, 8 Pac. (2d) 1006;

Moore v. Los Lugos Gold Mines, 172 Wash. 570, 21 Pac. (2d) 253;

which said decisions are by this reference made a part of this complaint as though herein fully set forth.

That the State of Washington has never attempted to procure a forfeiture of plaintiff's charter or to question in any manner whatsoever its corporate existence.

That the defendant dealt with the plaintiff as a corporation by accepting the plaintiff as the assignee of the contract hereinafter mentioned; by agreeing with the plaintiff as a corporation to modifications of said contract; and by accepting performance of said contract from the plaintiff as a corporation; as hereinafter alleged; and is estopped to deny that plaintiff was a corporation at the time of the dealings between plaintiff and defendant as hereinafter set forth and alleged.

[File endorsement omitted.]

[fol. 309] In District Court of Kootenai County

Order Overruling Demurrer to Answer—Filed August 30, 1937.

The Demurrer to the Answer having come on regularly for hearing on this day, pursuant to notice of hearing heretofore served and filed herein, and the plaintiff having submitted said demurrer without argument, and the Court, being well and fully advised in the premises, finds that said Demurrer to Answer should be overruled.

It is therefore ordered that the Demurrer to Answer be, and the same hereby is, overruled.

Dated at Coeur d'Alene, Idaho, this 30th day of August, A. D. 1937.

Bert A. Reed, District Judge.

[File endorsement omitted.]

[fol. 310] In District Court of Kootenai County

Stipulation Waiving Jury—Filed Jan. 4, 1938

It is hereby stipulated and agreed by and between the parties to the above entitled cause, acting through their

respective attorneys, that a jury be and it hereby is waived by both parties to the above entitled cause and that the same be tried to the Court, sitting without a jury.

Dated this 29 day of December, 1937.

C. H. Potts, Coeur d'Alene, Idaho; H. J. Hull, Wallace, Idaho, Attorneys for Plaintiff.

James A. Wayne, Wallace, Idaho, Attorney for Defendant.

[File endorsement omitted.]

[fol. 311] In District Court of Kootenai County

Notice to Produce Certain Documents, Etc.—Filed Feb. 8, 1938

To the Coeur d'Alene Mines Corporation, a corporation, defendant above named, and to James A. Wayne, its attorney:

You are hereby required to produce and have with you at the trial of the above entitled cause the originals of the letters and documents hereinafter referred to, and in the event of your failure to produce the same at the trial of said cause, the plaintiff will offer secondary evidence thereof, to-wit:

1. Letter dated February 1, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

2. Letter dated February 2, 1935, from A. C. Frost to R. W. Nuzum.

3. Letter dated February 5, 1935, from A. C. Frost to R. W. Nuzum.

4. Letter dated February 6, 1935, from A. C. Frost to R. W. Nuzum.

5. Two letters, each dated February 7, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

6. Letter dated February 15, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

7. Letter dated February 16, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

8. Letter dated February 20, 1935, from A. C. Frost to Miss Florence Coffeen, 605 Columbia Building, Spokane, Washington.

9. Letter dated February 25, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

10. Two letters, each dated March 5th, 1935, from A. C. [fol. 312] Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

11. Letter dated March 29, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

12. Letter dated April 25, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

13. Letter dated April 4, 1935, from A. C. Frost to R. W. Nuzum.

14. Letter dated May 11, 1935, from A. C. Frost & Company to Coeur d'Alene Mines Corporation.

15. Letter dated May 29, 1935, from A. C. Frost to R. W. Nuzum.

16. Letter dated June 1, 1935, from A. C. Frost to R. W. Nuzum enclosing certified copy of resolution adopted by Directors of A. C. Frost & Company, dated May 20, 1935, confirming agreement of May 11, 1935.

17. Letter dated June 6, 1935, from A. C. Frost to R. W. Nuzum.

18. Letter dated August 13, 1935, from A. C. Frost to R. W. Nuzum.

19. Letter dated September 10, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

20. Letter dated October 1, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

21. Letter dated October 7, 1935, from A. C. Frost to R. W. Nuzum, President, Coeur d'Alene Mines Corporation.

22. Letter dated October 8, 1935, from A. C. Frost to R. W. Nuzum.

Dated this 3rd day of February, 1938.

[fol. 313] C. H. Potts, Coeur d'Alene, Idaho; H. J. Hull, Wallace, Idaho, Attorneys for Plaintiff.

Service of the foregoing Notice to Produce and receipt of a copy thereof admitted this 3rd day of February, 1938.

James A. Wayne, Attorney for Defendant.

[File endorsement omitted.]

[fol. 314] In District Court of Kootenai County

Petition and Order Granting Extension of Time—Filed April 7, 1938

Comes now James A. Wayne, counsel for the above named defendant corporation and petitions the court for an extension of time in which to file his written brief on the issues in said case with the court and sets forth as reasons therefor that, due to other matters that has required his presence elsewhere that there has not been sufficient time in which to prepare and present said brief to the court and he therefore requests the court to grant such extension of time for the preparation and presenting said brief as to the court is deemed proper under the circumstances.

Dated this 6th day of April, 1938.

James A. Wayne, Counsel for defendant.

Order

Upon reading the foregoing petition and being fully advised of the circumstances therein and believing that an extension of time should be granted,

It is ordered that the time in which to prepare and present to the court the written brief in the above entitled matter is extended to and including the 25th day of April, 1938.

Dated this 7th day of April, 1938.

Bert A. Reed, District Judge.

[fol. 315] IN DISTRICT COURT OF KOOTENAI COUNTY

MOTION FOR LEAVE TO AMEND COMPLAINT TO CONFORM TO THE PROOF—Filed July 6, 1938

Now comes the plaintiff in the above entiled action, and moves the Court for leave to amend its complaint in said action to conform to the proof on the trial thereof, by substituting for the Second Cause of Action stated in the complaint, and the prayer of the complaint, an amendment, a copy of which amendment is hereto attached.

H. J. Hull, Residence and Post Office Address: Wallace, Idaho; C. H. Potts, Residence and Post Office Address: Coeur d'Alene, Idaho, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 316] IN DISTRICT COURT OF KOOTENAI COUNTY

AMENDMENT TO COMPLAINT—Filed July 6, 1938

Second Cause of Action

For a second cause of action against the defendant, plaintiff complains and alleges:

I

Plaintiff realleges and adopts Paragraph I to VI, inclusive, of its First Cause of Action as a part of this, its Second Cause of Action, as fully and to the same extent as if set forth herein at length.

II

That the defendant is indebted to the plaintiff in the sum of Sixteen Thousand Three Hundred Six ($16,306.00) Dollars, with interest thereon at the rate of six (6) per cent per annum from the 15th day of August, 1935, upon an account for moneys had and received from the proceeds of the sale of 90,000 shares of the treasury stock, at 19¢ per share, and 89,850 shares of treasury stock at various prices per share, made by Mr. R. W. Nuzum, and received by the defendant under said contract, Exhibit A, as modi-

fied by the agreement of May 15, 1935, for the use of plaintiff, no part of which has been paid, although plaintiff has demanded payment thereof and the defendant has acknowledged its indebtedness to the plaintiff in that amount.

Wherefore, plaintiff demands judgment against said defendant for the sum of Three Hundred Thousand ($300,000.00) Dollars on its first Cause of Action, and for the sum of Sixteen Thousand Three Hundred Six ($16,306.00) Dollars, with interest thereon at the rate of six (6) per cent per annum from August 15, 1935, on its Second Cause of Action, and for its costs and disbursements herein expended.

[fol. 317] *Duly sworn to by C. H. Potts. Jurat omitted in printing.*

[File endorsement omitted.]

[fols. 318-322] IN DISTRICT COURT OF KOOTENAI COUNTY

ORDER ALLOWING AMENDMENT TO COMPLAINT TO CONFORM TO THE PROOF

The motion of plaintiff for leave to amend its complaint in said action to conform to the proof coming on regularly for hearing on this day, and it appearing that said amendment is in furtherance of justice and should be allowed:

It is hereby ordered that leave be granted to the plaintiff, and that plaintiff be allowed to amend its complaint in said action by substituting for the Second Cause of Action stated in the Complaint, and the prayer of the complaint, an amendment, a copy of which amendment is hereto attached, marked "Amendment to Complaint," and made a part of this Order.

It is further ordered that said amendment be filed in the office of the Clerk of this Court forthwith, and a copy thereof served on the attorney of record for the defendant.

Done in open Court this 6th day of July, A. D. 1938.

Bert A. Reed, District Judge.

[fol. 323] IN DISTRICT COURT OF KOOTENAI COUNTY

Findings of Fact and Conclusions of Law—Filed July 6, 1938

This cause came on regularly for trial before the Court, sitting without a jury (trial by jury having been waived by the parties by the written consent of their attorneys of record filed with the Clerk), on the 8th day of February, A. D. 1938, the plaintiff being represented by its attorneys, Mr. H. J. Hull, of Wallace, Idaho, and Mr. C. H. Potts, of Coeur d'Alene, Idaho, and the defendant being represented by its attorney, Mr. James A. Wayne, of Wallace, Idaho. Sworn testimony and documentary evidence was introduced by and on behalf of plaintiff and the defendant; and both sides having rested, the cause was subsequently argued and submitted to the Court for its decision, and the Court, being now fully advised in the premises, makes and enters the following Findings of Fact and Conclusions of Law, constituting the decision herein, to-wit:

FINDINGS OF FACT.

1. That at the time of the commencement of this action the plaintiff, A. C. Frost & Company, was, and yet is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its office and principal place of business in the City of Seattle, King County, State of Washington, and at such times was, and now is, engaged in business in the State of Washington, and has not been doing business in the State of Idaho at any time.

That plaintiff was organized as a corporation under the laws of the State of Washington on September 8, 1924; that on July 1, 1931, it was stricken from the records of the office of the Secretary of State of the State of Washington for failure to pay its annual license fee under the laws of [fol. 324] Washington; that on July 1, 1934, the Secretary of State of the State of Washington entered on his books a notation that plaintiff was "stricken from the records and dissolved July 1, 1934, Chap. 144, L. 1923"; that Chapter 144 of the Laws of 1923 of the State of Washington was in force and effect from and after midnight of June 6, 1923, until midnight of March 12, 1937; that Section 3846 of Remington's Revised Statutes of the State of Washing-

ton was in force and effect until midnight of March 12, 1937, and is as follows:

"Dissolution for nonpayment. If, however, within the period named within which a corporation may make application to be reinstated, such corporation shall not have made such application, the Secretary of State shall enter upon his records a notation that said corporation is dissolved, and it shall thereupon be dissolved, and the trustees of the corporation shall hold title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings."

That at all times since midnight of the 12th day of March, 1937, Chapter 70 of the Laws of 1937 of the State of Washington has been, and now is, in force and effect; that Section 14 of said chapter is as follows:

"Sec. 14. In the event that any corporation shall allow license fees due the State under existing laws or by virtue of this chapter, to become delinquent for a period of three consecutive years and the secretary of state shall be unable to collect in said fees in full, it shall be his duty to enter upon his records a notation that such corporation is dissolved and said corporation shall thereupon be dissolved and the secretary of state shall thereupon be free to grant [fol. 325] the name of the corporation so dissolved to any other corporation thereafter organized: Provided, however, That any corporation which may have been heretofore stricken or dissolved or which may hereafter be dissolved by the secretary of state for non-payment of fees under existing laws or this chapter is hereby given the privilege of becoming reinstated and having its corporate license restored by applying to the secretary of state for such reinstatement at any time within ten (10) years after such corporation may have been or may be stricken or dissolved, and paying to the secretary of state for the use of the state, all license fees and penalties due to the state under existing laws and this chapter and the additional sum of ten dollars ($10.00) for each and every year that its name has been stricken from, or noted as dissolved upon the records, or paying to the secretary of state for the use of the state the license fees and penalties due to the state under existing laws or this chapter and the penalty above provided for the most distant year then due and unpaid and

also for the year last due and unpaid and enter into a contract with the secretary of state, according to a form to be approved by him, for the payment of all other unpaid license fees and penalties then due from it, in ten (10) semi-annual installment payments, to begin upon the due date of the next annual license fee. The current annual license fee shall not be received unless the installment payments due have been paid: Provided, further, That the privilege of becoming reinstated shall not be granted to any corporation where the name of such corporation has been given to a new corporation organized after its dissolu-
[fol. 326] tion.

"Upon reinstatement as herein provided it shall be the duty of the secretary of state to enter upon his records a notation that such corporation is reinstated, and it shall thereupon be reinstated as of the date on which its name was stricken from or noted as dissolved upon the records of the office of the secretary of state, and such corporation shall have the right to sue and shall enjoy the same rights and powers as if its name had never been stricken from the records or it had never been dissolved and all things done by it in the exercise of its corporate powers before such reinstatement shall become valid acts of the corporation."

That pursuant to said Chapter 70 of the Laws of 1937 of the State of Washington, the plaintiff, on March 15, 1937, was reinstated as a corporation as of July 1, 1934, and the Secretary of State of the State of Washington, on March 15, 1937, entered upon his records a notation that plaintiff was reinstated.

That the State of Washington recognizes the present corporate existence of the plaintiff, it having, on the 15th day of March, 1937, issued to plaintiff its annual license to do business for the year ending July 1, 1937, and having reinstated the plaintiff on that date, and it having, on the 21st day of June, 1937, issued to plaintiff its annual license to do business for the year ending July 1, 1938, and said State not having questioned in any manner or at any time plaintiff's corporate existence.

That under said Chapter 144 of the Laws of 1923 of the State of Washington, the same being included in Sections 3842 to 3846, inclusive, of Remington's Revised Statutes of
[fol. 327] the State of Washington, every domestic corpora-

tion is required to pay an annual license fee to the Secretary of State of the State of Washington for each year beginning on July 1st, and ending on June 30th, and in the event any such domestic corporation shall fail to pay such annual license fee within the time provided by law, i. e., on or before July 1st of each year, the Secretary of State is required, under the laws of said State of Washington, to strike the name of such corporation from the records in his office, and to enter upon said records the statement, "Stricken from records July 1," and adding the year for the nonpayment of its license fee in which such corporation is stricken.

That pursuant to said laws of the State of Washington, the name of the plaintiff was stricken from the records on July 1, 1931, and plaintiff was dissolved on July 1, 1934, and was thereafter reinstated on March 15, 1937.

The contract involved in this case, known as the "option agreement", was made and entered into by plaintiff and defendant after plaintiff had been dissolved and before plaintiff had been reinstated. At the time the contract was entered into, to-wit, on September 10, 1934, the charter of plaintiff had become forfeited as a result of its dissolution on July 1, 1934, and plaintiff had become a defunct corporation, and was a defunct corporation at the time said contract was negotiated and executed.

That it is not the law of the State of Washington that the dissolution of a corporation under said laws, and the entry by the Secretary of State of a notation that such corporation is dissolved, does not terminate the existence of such corporation or result in the forfeiture of its charter, or that [fol. 328] such corporation continues to exist until the State of Washington, in a proper proceeding in a proper court, procures an adjudication of forfeiture and enforces it, and such was not established or held to be the law by the Supreme Court of Washington in its line of decisions set forth in the Stipulation of Facts, Plaintiff's Exhibit No. 4.

That the defendant dealt with the plaintiff as a corporation by accepting the plaintiff as the assignee of the contract hereinafter mentioned; by agreeing with the plaintiff as a corporation to modifications of said contract; and by accepting performance of said contract from the plaintiff as a corporation; as alleged in the complaint; and is estopped to deny that plaintiff was a corporation at the

time of the dealings between plaintiff and defendant as in the complaint set forth and alleged.

That the reinstatement of the plaintiff as a corporation of the State of Washington on March 15, 1937, pursuant to Chapter 70 of the Laws of 1937 of the State of Washington, did not revive the plaintiff as a corporation to the extent that the option agreement of September 10, 1934, was validated and rendered enforceable as an executory contract; but as to all dealings and transactions between the plaintiff and defendant under said option agreement, the defendant, by reason of its dealings with the plaintiff, is estopped to deny that plaintiff was a corporation at the time of such dealings, or that plaintiff connot maintain this action with reference to such dealings.

2. That at all the times mentioned in the complaint the defendant was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State [fol. 329] of Idaho, with its registered office in the City of Coeur d'Alene, Kootenai County, State of Idaho, at the time the complaint was filed, which city is designated in its Articles of Incorporation as the place where the principal business of said corporation is to be transacted. Since the filing of the complaint the principal place of business of the defendant corporation has, by an amendment to its Articles of Incorporation, been changed to Wallace, Shoshone County, Idaho. Defendant established and has maintained a branch office in the City of Spokane, State of Washington, and the principal business of the defendant has been transacted at said branch office at all the times mentioned in the complaint.

3. That on or about the 10th day of September, A. D. 1934, at the City of Spokane in the State of Washington, the defendant entered into a contract in writing with one W. J. Boland of Toronto, Province of Ontario, Dominion of Canada, Wherein the defendant represented (among other things) that the authorized capital stock of the defendant consisted of Three Million (3,000,000) shares of the par value of One ($1.00) Dollar per share; that of that stock there remained in the treasury One Million Three Hundred Thousand (1,300,000) shares free from lien, encumbrance or contract of any kind; and that the defendant was authorized to sell and deliver said 1,300,000 shares of treasury stock

upon such terms as it might deem proper; and wherein the defendant, in consideration of the payment of the sum of Twenty-five Hundred ($2500.00) Dollars by the said W. J. Boland, did grant unto the said W. J. Boland the sole and exclusive right and option to purchase the whole or any part of said 1,300,000 shares of treasury stock of the defendant at the price of Ten (10¢) Cents per share, payable [fol. 330] as follows: $2500.00 on the signing of said option; $2500.00 on October 10, 1934; $2500.00 on November 10, 1934; $2500.00 on December 10, 1934; $10,000.00 on January 10, 1935; and $10,000.00 on the tenth of each month thereafter until the full purchase price of $130,000.00 is paid.

In said contract it was further agreed between the defendant and the said W. J. Boland that if the financial conditions during the months of January, February, March, and April, 1935, are such as to make it difficult to finance 100,000 shares of said stock each month, that the payment of $3500.00 for 35,000 shares of said stock during the months of January, February, March, and April, 1935, shall meet the requirements of said option.

In said contract it was further agreed between the defendant and the said W. J. Boland that in the event the said W. J. Boland fails to exercise in full the option as therein provided, and purchase the stock as therein provided, and make the payments as therein provided on the dates therein set forth, said option shall, on ten days' written notice, given by the defendant to the said W. J. Boland, terminate; and the rights or obligations of the said W. J. Boland under said option shall likewise terminate, and he shall be entitled only to the stock which has been paid for, and there shall be no liability on the part of the said W. J. Boland for failure to exercise said option as therein provided.

That Exhibit "A", attached to the complaint, is a true copy of said contract of September 10, A. D. 1934, and is hereinafter referred to as the "option agreement."

4. That thereafter, and on or about the 10th day of September, A. D. 1934, the said W. J. Boland, the party of [fol. 331] the second part in said contract, for a valuable consideration, duly assigned, transferred and set over unto the plaintiff all his right, title, and interest in and to said contract attached to the complaint, marked Exhibit "A",

and all his right, title, and interest to the shares of stock mentioned in said contract, by an assignment in writing bearing date of September 10, A. D. 1934, a copy of which assignment is attached to the complaint, marked Exhibit "B".

That by virtue of the assignment aforesaid the plaintiff succeeded to all the rights of the said W. J. Boland under said contract, marked Exhibit "A," and to the shares of stock therein mentioned, and the same vested in the plaintiff as assignee of the said W. J. Boland on or about the 10th day of September, 1934, with the knowledge and consent of the defendant. The defendant thereafter, at all times, accepted the plaintiff as the assignee of the said W. J. Boland under said contract, marked Exhibit "A," and accepted said assignment as a valid assignment and transfer of all the rights of the said W. J. Boland under said option agreement to the plaintiff.

That the said W. J. Boland, to whom said option agreement was given and who assigned the same to the plaintiff, was, at all times, the acting agent for the plaintiff in obtaining said option agreement, and that the plaintiff, at all such times, was the owner of said option agreement.

That the said W. J. Boland was not acting surreptitiously as trustee for plaintiff in obtaining said option agreement for the reason that plaintiff had been dissolved as a corporation and could not legally enter into any contract or agreement or instrument whatsoever, or in fact had no existence as a corporation, but was acting as agent for [fol. 332] the plaintiff in the negotiations which resulted in obtaining said option agreement from the defendant; that defendant received notice of the assignment of said option agreement by the said W. J. Boland to the plaintiff within a short time after the execution thereof, and accepted the plaintiff as the assignee of the said W. J. Boland under said option agreement, and thereafter recognized and dealt with the plaintiff as the party of the second part thereto.

5. That thereafter and on or about the 26th day of April, 1935, plaintiff and defendant agreed in writing to modify said option agreement with respect to the dates and amounts of the monthly payments to be made thereunder, and mutually agreed that the payment of $3500.00 due on April 10, 1935, and the payments of $10,000.00 each

due on the tenth of each month thereafter until the full purchase price of $130,000.00 is paid accord-ng to the terms of said contract, should be made on the dates and in the amounts as follows: On or before April 27, 1935, $1000.00; on or before May 10, 1935, $2000.00; on or before June 10, 1935, $2000.00; on or before July 10, 1935, $3500.00; on or before August 10, 1935, $3500.00; on or before September 10, 1935, $3500.00; on or before October 10, 1935, $3500.00; and at the rate of $5000.00 on or before the tenth day of each succeeding month until the remaining treasury shares, at the rate of 10¢ per share, shall have been taken up and paid for.

6. That thereafter, and on or about the 15th day of May, 1935, plaintiff and defendant agreed in writing to modify said option agreement as follows: Plaintiff submitted to defendant an offer to modify said option agreement in a letter bearing date of May 11, 1935, in words and figures as follows:

[fol. 333] Spokane, Washington
May 11, 1935

Couer d'Alene Mines Corporation,
605 Columbia Building,
Spokane, Washington.

GENTLEMEN:

I am willing that the proceeds from the sale of the treasury stock after the sale of the next 20,000 shares shall be placed in the treasury for the purpose of meeting the following expenditures and disbursements:

First: The speedy development of the property and the purchase of the necessary equipment to accomplish it.

Second: The purchase of the Mineral Point Mine.

Third: Nuzum & Nuzum are to be reimbursed for all advances, with interest at 7% per annum, out of the funds now in the treasury.

Fourth: For the construction of a mill when it is mutually agreed it is advisable, but said construction must be decided upon within six months from this date unless the time for the construction of said mill is further extended by mutual agreement to a definite time; and if said con-

struction is not so begun as herein agreed or a definite extension is not agreed upon, then said funds as are not yet disbursed shall be made available to A. C. Frost & Company.

All credits over and above ten cents per share are to be placed to the credit of A. C. Frost & Company, with interest at six per cent per annum, to be reimbursed to us from the first earnings of the property.

[fol. 334] As to the amounts realized from the proceeds of the sale of the treasury stock made by Mr. R. W. Nuzum, they are to remain in the treasury and the proceeds over and above ten cents per share shall be placed to the credit of A. C. Frost & Company.

Very truly yours, (Signed) A. C. Frost & Company.
By A. C. Frost, Pres.

The defendant accepted the offer as set forth in said letter at a meeting of its Board of Directors held in Spokane, Washington, on May 15, 1935, at which meeting a motion was adopted that the proposition of the plaintiff, as set forth in said letter, be accepted, and in consideration thereof the defendant waive any claim it might have with reference to the said option agreement to W. J. Boland, and by him assigned to plaintiff under date of September 10, 1934.

7. That financial conditions were such as to make it difficult to finance 100,000 shares of said stock each month during the months of January, February, March, and April, 1935, and defendant agreed to and did accept payments of $3500.00 for 35,000 shares of said stock during each of the months of January, February, and March, 1935, and agreed to and did accept a payment of $1000.00 for 10,000 shares of said stock for the month of April, 1935, in accordance with the modification of said option agreement made on or about April 26, 1935, as alleged in the complaint.

8. That plaintiff paid or caused to be paid to the defendant the payments provided in said option agreement, as modified by said agreement of April 26, 1935, aggregating the sum of $16,500.00, which paid for 165,000 shares [fol. 335] of stock, which was duly issued to the plaintiff and accepted by plaintiff for the amount so paid. Said payments were made as follows: On September 10, 1934, $2500.00 for 25,000 shares; on October 10, 1934, $2500.00

for 25,000 shares; on November 10, 1934, $2500.00 for 25,000 shares; on December 10, 1934, $2500.00 for 25,000 shares; on January 16, 1935, $3500 for 35,000 shares; on March 15, 1935, $1000.00 for 10,000 shares; and on April 26, 1935, $1000.00 for 10,000 shares; and on March 22, 1935, $1000.00 for 10,000 shares.

The payments above set forth were made directly by or on behalf of plaintiff to the defendant, and in addition to such direct payments, the plaintiff caused to be paid to the defendant, and the defendant received, the option price of 10¢ per share for 279,850 shares of said treasury stock covered by the option agreement sold to other parties than the plaintiff, and defendant received therefor the sum of $27,985.00 as the purchase price of said shares under the terms of the option agreement. Included in said sales were a sale of 80,000 shares made to E. J. Gibson & Company on May 8, 1935, and a sale of 20,000 shares made to the J. E. Jones Brokerage Company in June, 1935. The defendant received the sum of $8000.00 on May 9, 1935, from the proceeds of the sale of the 80,000 shares to E. J. Gibson & Company, and early in June, 1935, received $2000.00 from the proceeds of the sale of 20,000 shares to J. E. Jones Brokerage Company. The $8000.00 received by the defendant on May 9, 1935, was sufficient to meet the payments required of the plaintiff under the terms of the option agreement, as modified, of $2000.00 due on May 10, 1935, $2000.00 due on June 10, 1935, and $3500.00 due on July 10, 1935, and left $500.00 to apply on the [fol. 336] payment due on August 10, 1935. The proceeds of the sales of said stock made to others than the plaintiff were sufficient to meet the payments according to the option agreement, as modified, up to and including the payment due on October 10, 1935.

9. The plaintiff did not fully perform what was required of it by virtue of said option agreement and the modifications thereof as the assignee of the said W. J. Boland, until prevented from further performance thereof by the defendant, but because of its inability to finance the purchase of the stock according to the terms of the option agreement, and to have the stock registered with the Securities Exchange Commission so that it might be sold upon different exchanges of the country, the plaintiff abandoned the option to purchase the remainder of the

stock covered by said option agreement, in the summer of 1935, and did not thereafter exercise its rights under said option, or attempt to make further purchase of the stock.

10. During the month of June, 1935, the defendant refused to deliver any more stock to the plaintiff under said option agreement on the ground that the stock had not been registered with the Securities Exchange Commission, and refused to perform the agreement further until such registration was made and authority obtained for the sale of the stock under the Securities Act of 1933, as amended.

The shares of the stock of the defendant covered by said option agreement were never registered for sale under the Securities Act of 1933, and acts amendatory thereof and supplementary thereto, and the option agreement was entered into in violation of said laws, and both plaintiff and defendant were charged with knowledge of said laws, and [fol. 337] by reason thereof the said option agreement for the sale and delivery of the said shares of stock by the defendant to the plaintiff could not be enforced.

11. That on or about March 13, 1936, the defendant caused to be served on plaintiff a notice of the termination of said option agreement, on the ground of failure in performance thereof by the plaintiff. The plaintiff had not fully performed said contract up to the time it was prevented from so doing by the defendant, and was not at all times ready, willing, and able to perform the same. The defendant did not renounce said contract in June, 1935, or refuse to be longer bound thereby, or so notify plaintiff, and did not continuously thereafter repudiate its obligations under said contract, or refuse to deliver any of said stock to the plaintiff. The defendant did not prevent the plaintiff from performing said contract, and the failure of the plaintiff to perform the contract was due to its inability to finance the payments and to register the stock.

12. That in the month of June, 1935, at the time the plaintiff claims the defendant repudiated said contract and refused to make further delivery of stock thereunder, there remained unsold at least 805,150 shares of said treasury stock. The market price of said shares of stock, and the fair value thereof during the month of June, 1935, was not from 59¢ to 60¢ per share, and said stock had no market price in sufficient volume to establish a definite

value therefor at that time. The plaintiff would not have made a profit in excess of $300,000.00, or in any amount, if the remaining shares of said treasury stock covered by the option agreement had been delivered to it, and [fol. 338] has not been damaged in the sum of $300,000.00, or any amount, by defendant's breach of said contract.

13. The plaintiff never, at any time, complied with the laws of the State of Idaho with reference to foreign corporations doing business within said state, but the plaintiff did not engage in doing business in the State of Idaho in violation of the laws thereof by entering into the option agreement, or attempting to enter into such agreement, or by its dealings thereunder. The sale of the 20,000 shares of stock to the J. E. Jones Brokerage Company constituted doing business in Idaho, but as it was a single, isolated transaction the plaintiff did not thereby engage in doing business in Idaho within the intent and meaning of the Foreign Corporation Laws of the State of Idaho.

14. That at all of the times mentioned in the answer, there was in force and effect in the State of Washington a provision of its Constitution, being Article II, Section 28, subdivision 9, providing as follows: to-wit:

"The Legislature is prohibited from enacting any private or special laws in the following cases: * * * (from) giving effect to invalid deeds, wills, or other instruments."

15. That the plaintiff did not default in the performance of said option agreement by failing to make a payment of $2000.00 falling due under said instrument, as modified, on May 10, 1935, and plaintiff did make further payments thereunder subsequent to that date by the application of the proceeds of the shares of said stock sold to others than the plaintiff. Plaintiff did not forfeit such rights as it had under said option agreement because of its failure to make [fol. 339] the payment due thereunder on May 10, 1935.

16. That the defendant is indebted to the plaintiff in the sum of $16,306.00, with interest thereon at the rate of 6 per cent per annum from the 15th day of August, 1935, upon an account for moneys had and received from the proceeds of the sale of 90,000 shares of the treasury stock at 19¢ per share, and 89,850 shares of the treasury stock at various prices per share, made by Mr. R. W. Nuzum, and received by

the defendant under said contract, Exhibit "A", as modified by the agreement of May 15, 1935, for the use of plaintiff, no part of which has been paid, although plaintiff has demanded payment thereof, and the defendant has acknowledged its indebtedness to the plaintiff in that amount.

From the foregoing Findings of Fact, the Court draws the following

CONCLUSIONS OF LAW

1. That upon the reinstatement of the plaintiff as a corporation of the State of Washington on the 15th day of March, 1937, pursuant to the provisions of Chapter 70 of the Laws of 1937 of the State of Washington, the said plaintiff became entitled to the right to sue and to enjoy the same rights and powers as though its name had never been stricken from the records of the State of Washington, or it had never been dissolved, but such reinstatement did not revive the plaintiff as a corporation to the extent that the option agreement of September 10, 1934, was validated and rendered enforceable as an executory contract, and the plaintiff is not entitled to maintain this action thereon for damages for the breach of said contract.

2. That the defendant, by reason of its dealings with [fol. 340] the plaintiff as a corporation under said option agreement, is estopped to deny that the plaintiff was a corporation at the time of such dealings, or that the plaintiff cannot maintain this action with reference to all dealings and transactions between the plaintiff and the defendant under said option agreement, and particularly the dealings set forth in the Second cause of Action stated in the complaint.

3. That the plaintiff did not engage in doing business in the State of Idaho in violation of the laws of said state with reference to foreign corporations doing business within the state by entering into the option agreement, or attempting to enter into such agreement, or by its dealings thereunder; and that by the single, isolated transaction in which the plaintiff sold 20,000 shares of stock to the J. E. Jones Brokerage Company, the plaintiff did not engage in doing business in Idaho within the intent and meaning of the Foreign Corporation Laws of the State of Idaho, and is not prevented from the maintenance of this action through its failure to comply with such laws.

4. That the option agreement of September 10, 1934, was entered into in violation of the Securities Act of 1933, and acts amendatory thereof and supplementary thereto, and is not enforceable as to the un-executed parts of said agreement.

5. That the acts and conduct of the plaintiff constituted an abandonment of the option agreement in the summer of 1935, and the plaintiff thereby forfeited its rights under said option agreement with respect to further performance thereof by the defendant.

6. That the plaintiff is not entitled to recover damages from the defendant for the alleged breach of said option [fol. 341] agreement on the First Cause of Action stated in the complaint; and the defendant is entitled to judgment that the plaintiff take nothing on said First Cause of Action.

7. That the plaintiff is entitled to recover judgment against the defendant on its Second Cause of Action stated in the Complaint, for the sum of Sixteen Thousand Three Hundred Six ($16,306.00) Dollars, with interest thereon at the rate of six (6) per cent per annum from the 15th day of August, 1935, until paid, and for its costs and disbursements incurred in this action.

And it is hereby ordered that Judgment be entered accordingly.

Done in open Court this 6th day of July, A. D. 1938.

Bert A. Reed, District Judge.

[File endorsement omitted.]

[fol. 342] IN DISTRICT COURT OF KOOTENAI COUNTY

JUDGMENT—Filed July 6, 1938

This cause came on regularly for trial before the Court, sitting without a jury (trial by jury having been waived by the parties by the written consent of their attorneys of record filed with the Clerk), on the 8th day of February, A. D. 1938, the plaintiff being represented by its attorneys, Mr. H. J. Hull, of Wallace, Idaho, and Mr. C. H. Potts, of Coeur d'Alene, Idaho, and the defendant being represented

by its attorney, Mr. James A. Wayne, of Wallace, Idaho. Sworn testimony and documentary evidence was introduced by and on behalf of plaintiff and defendant, and both sides having rested, the cause was subsequently argued and submitted to the Court for its decision; and the Court, being fully advised in the premises, has made and entered its Findings of Fact and Conclusions of Law, and ordered that Judgment be entered in accordance therewith.

Now Therefore, By virtue of the premises and the Findings aforesaid;

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff take nothing on the First Cause of Action stated in the complaint.

It Is Further Ordered, Adjudged, and Decreed that the plaintiff, A. C. Frost & Company, a corporation, do have and recover of and from the defendant, Coeur d'Alene Mines Corporation, a corporation, the sum of Sixteen Thousand Three Hundred Six ($16,306.00) Dollars, with interest thereon at the rate of six (6) per cent per annum from the 15th day of August, 1935, to this date, amounting to the sum of Twenty-eight Hundred Twenty-six and 38/100 Dollars, aggregating the total sum of Nineteen Thousand One Hun-
[fol. 343] dred Thirty-two and 38/100 ($19,132.38) Dollars, on the Second Cause of Action Stated in the Complaint, and its costs and disbursements incurred in this action, taxed at the sum of Fifty-four and 40/100 Dollars.

Done in open Court this 6th day of July, A. D. 1938.

Bert A. Reed, District Judge.

Attest:

Jas. A. Foster, Clerk. (Court Seal)

[File endorsement omitted.]

[fol. 344] Clerk's Certificate to judgment roll omitted in printing.

[fol. 345] In District Court of Kootenai County

Notice of Appeal—Filed October 3, 1938

To Coeur d'Alene Mines Corporation, a corporation, the above named defendant, and to Mr. James A. Wayne, attorney for defendant:

You, and each of you, will please take notice that the above named plaintiff, A. C. Frost & Company, a corporation, being aggrieved thereby, hereby appeals to the Supreme Court of the State of Idaho from that certain Judgment made and rendered in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, in the above entitled action, on the 6th day of July, A. D. 1938, and entered and docketed on the 6th day of July, A. D. 1938, and recorded in the records of said District Court in Book 16 of Judgments, on page 565 thereof, in favor of the defendant and against the plaintiff, and which adjudged that the plaintiff take nothing on the First Cause of Action stated in the complaint, and reads as follows:

"It Is Hereby Ordered, Adjudged and Decreed that the plaintiff take nothing on the First Cause of Action stated in the complaint."

This appeal is taken from the specific part of said Judgment above set forth, and upon questions of both law and fact.

Dated at Coeur d'Alene, Idaho, this 3rd day of October, A. D. 1938.

H. J. Hull, Residence and Post Office Address: Wallace, Idaho; C. H. Potts, Residence and Post Office Address: Coeur d'Alene, Idaho, Attorneys for Plaintiff.

[fol. 346] Service of the foregoing notice of appeal and receipt of a copy thereof is hereby acknowledged this 3rd day of October, 1938.

James A. Wayne, Attorney for Defendant and Respondent. Residence & P. O. Address, Wallace, Idaho.

[File endorsement omitted.]

[fol. 347] In District Court of Kootenai County

Notice of Appeal—Filed Oct. 4, 1938.

To A. C. Frost & Company, a corporation, the plaintiff above-named, and to Messrs. H. J. Hull and C. H. Potts, attorneys for said plaintiff:

You, and each of you, will please take notice that Couer d'Alène Mines Corporation, a corporation, the defendant herein above named, being aggrieved, hereby appeals to the Supreme Court of the State of Idaho, from that specific part, and that part only, of that certain judgment made and entered herein on the 6th day of July, A. D. 1938, by which it is further ordered, adjudged and decreed that the plaintiff, A. C. Frost & Company, a corporation, do have and recover of and from the defendant, Couer l'Alene Mines Corporation, a corporation, the sum of Sixteen Thousand Three Hundred Six ($16,306.00) Dollars, with interest thereon at the rate of six (6) per cent per annum from the 15th day of August, 1935, to this date, amounting to the sum of Twenty-eight Hundred Twenty-six and 38/100 Dollars, aggregating the total sum of Nineteen Thousand One Hundred Thirty-two and 38/100 ($19,132.38) Dollars, on the Second Cause of Action stated in the complaint, and its costs and disbursements incurred in this action, taxed at the sum of Fifty-four and 40/100 ($54.40) Dollars. This appeal is taken upon questions of both law and fact.

Dated this 1st day of October, A. D. 1938.

James A. Wayne, Attorney for defendant, residence and post office Address, Wallace, Idaho.

Service of the within notice of appeal and the receipt of a copy thereof is hereby admitted this 4th day of October, 1938.

C. H. Potts, H. J. Hull, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 348] In District Court of Kootenai County

Precipe for Clerk's Transcript—Filed October 4, 1938

To Mr. Jas. A. Foster, Clerk of the above-entitled Court:

You are hereby requested and required to prepare an original and four carbon copies of a transcript on appeal in the above entitled action, to be used on appeal from the above-entitled Court to the Supreme Court of the State of Idaho, and containing the following papers:

1. Judgment Roll and Certificate thereto;
2. Order for Reporter's Transcript with proof of Service thereof;

3. Reporter's Transcript;
4. Notice of Appeal with Acceptance of Service thereof;
5. Clerk's Certificate showing filing of Undertaking On Appeal;
6. All journal entries relative to this cause;
7. This Praecipe.

James A. Wayne, Attorney for Defendant, residence and post office address, Wallace, Idaho.

Service of the within praecipe for Clerk's transcript is hereby admitted this 4 day of October, 1938.

C. H. Potts, H. J. Hull, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 349] Bond on Appeal for $300.00, filed Oct. 4, 1938, omitted in printing.

[fol. 350] In District Court of Kootenai County

Order for Reporter's Transcript—Filed October 4, 1938

To Mr. Herbert F. Minster, official Court Reporter of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai:

You are hereby ordered and directed to forthwith prepare and within 40 days from the date of this order complete and lodge with the Clerk of the above-entitled Court a transcript of the testimony and proceedings of the trial and hearing of the above-entitled action, including all rulings, orders and decisions of said Court in said trial and hearing, and all objections and exceptions made and taken in and at said trial and hearing, and all rulings, orders and decisions on objections and evidence or any other contested proceedings in said trial and hearing, all in accordance with Section 7-509, Idaho Code Annotated.

Dated this 4th day of October, 1938.

Bert A. Reed, Judge.

Service of the foregoing order for reporter's transcript is hereby acknowledged and receipt of a true copy admitted this 4 day of October, 1938.

Herbert F. Minster, Court Reporter.

[File endorsement omitted.]

[fol. 351] IN DISTRICT COURT OF KOOTENAI COUNTY

PLAINTIFF'S PRAECIPE FOR CLERK'S TRANSCRIPT—Filed October 7, 1938

To Jas. A. Foster, Clerk of the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai:

You Are Hereby Directed to prepare, certify and transmit to the Clerk of the Supreme Court of the State of Idaho a transcript on appeal in the above entitled action, consisting of an original and four (4) carbon copies thereof, to be used on appeal from the above entitled court to the Supreme Court of the State of Idaho, containing the papers specified in the Praecipe for Clerk's Transcript filed in said cause by the defendant on October 4, 1938, and, in addition thereto, the following papers:

1. Notice of Appeal filed by plaintiff on October 3, 1938, with acceptance of service thereof.

2. Certificate of Clerk showing that an Undertaking on Appeal in due form has been properly filed by plaintiff.

3. Stipulation of Facts filed in the cause on February 8, 1938.

4. Order Allowing Amendment to Complaint to Conform to the Proof, dated and filed on July 6, 1938.

5. Order Settling Reporter's Transcript, and all papers, notices, orders, and proofs of service filed in connection with the settlement of said Reporter's Transcript.

6. This Praecipe.

Dated at Coeur d'Alene, Idaho, this 7th day of October, 1938.

H. J. Hull, Residence and Post Office Address: Wal-
[fol. 352] lace, Idaho; C. H. Potts, Residence and Post Office Address: Coeur d'Alene, Idaho, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 353-354] Bond on Appeal for $300.00, filed Oct. 7, 1938, omitted in printing.

[fol. 355] In District Court of Kootenai County

Stipulation as to Transcript of Record—Filed November 5, 1938

Whereas, the plaintiff, A. C. Frost & Company, a corporation, has appealed to the Supreme Court of the State of Idaho from that portion of the Judgment, entered and docketed in the above entitled action on the 6th day of July, 1938, which relates to the First Cause of Action therein; and the defendant, Coeur d'Alene Mines Corporation, a corporation, has appealed from that portion of said Judgment which relates to the Second Cause of Action therein; and each of said parties has filed with the Clerk of said Court a Praecipe for a Clerk's Transcript, and an order has been entered therein for the preparation of a Reporter's Transcript, and the defendant has incurred the obligation to pay the costs of said transcript to the Clerk and Reporter respectively;

Now Therefore, the parties hereto, acting through their respective counsel, stipulate that but one Reporter's and Clerk's Transcript need be prepared in connection with said appeals; that the defendant shall pay the entire cost of both transcripts to the Clerk and Reporter respectively; and that the plaintiff may have the use of the Transcript on Appeal, including both the Clerk's and Reporter's Transcripts, on its appeal to the Supreme Court, upon the payment of one-half of the cost of said Transcripts to the defendant or its attorney; and that the plaintiff shall not be entitled to the use of said record on appeal until it shall have paid its one-half of the cost thereof.

Dated this 3rd day of November, A. D. 1938.

C. H. Potts, H. J. Hull, Attorneys for Plaintiff.
James A. Wayne, Attorney for Defendant.

[File endorsement omitted.]

[fol. 356] In District Court of Kootenai County

Petition for Extension of Time and Order Granting Same—Filed November 10, 1938

Comes now Herbert F. Minster, one of the Reporters of the District Court of the eighth Judicial District of Idaho

and petitions the Court for an extension of time in which to prepare and lodge the transcript of evidence in the above entitled matter pursuant to order made and served upon him on the 4th day of October, 1938. That as a basis for granting said extension of time in which to prepare and lodge said transcript with the Clerk of the above entitled Court, he states that due to other orders for transcripts and preparation of the same, which said orders have precedence by reason of prior issuance, and because of other official duties, there is not now sufficient time remaining under said order for transcript in which to complete the same.

Wherefore this petitioner asks that the time be extended to and including the 31st day of December, 1938, in which to prepare and lodge said transcript in the manner required by law.

Dated this 10th day of November, 1938.

Herbert F. Minster, Reporter.

ORDER

Upon reading the foregoing petition, and believing that it is necessary that an extension of time be granted,

It is ordered that the time within which to prepare and lodge the transcript of evidence in the above entitled matter be extended to and including the 31st day of December, 1938.

Dated this 10th day of November, 1938.

Ed S. Elder, District Judge.

[fol. 357] IN DISTRICT COURT OF KOOTENAI COUNTY

ADMISSION OF SERVICE OF REPORTER'S TRANSCRIPT—Filed January 12, 1939

Service of the reporter's transcript in the above-entitled cause and receipt of a copy thereof is hereby admitted this 11th day of January, 1939.

C. H. Potts, H. J. Hull, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 358] IN DISTRICT COURT OF KOOTENAI COUNTY

CERTIFICATE OF JUDGE TO REPORTER'S TRANSCRIPT—Filed January 30, 1939

I, Bert A. Reed, Judge of the District Court of the Eighth Judicial District of the State of Idaho, being the Judge who tried the above-entitled cause, do hereby certify that the foregoing reporter's transcript was handed me by the Clerk of the District Court of the Eighth Judicial District of the State of Idaho on the 30th day of January, 1939, and it appearing to me that due service of the same was made upon the attorneys for the parties to this action, and that neither of the parties to this action have offered any amendments thereto, and it further appearing to me that said reporter's transcript is correct and contains in substance all of the evidence offered at the trial of said cause and the rulings thereon, the said reporter's transcript is hereby settled and allowed.

Dated at Coeur d'Alene, Idaho, this 30th day of January, 1939.

Bert A. Reed, Judge of the Eighth Judicial District of the State of Idaho.

[File endorsement omitted.]

[fols. 359-363] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 364] IN SUPREME COURT OF IDAHO, COEUR D'ALENE, NOVEMBER TERM, 1939

(No. 6646)

[File endorsement omitted]

A. C. FROST & COMPANY, a Corporation, Respondent and Cross Appellant,

vs.

COEUR D'ALENE MINES CORPORATION, a Corporation, Appellant and Cross Respondent

Appeal from the District Court of the Eighth Judicial District, for Kootenai County. Hon. Bert A. Reed, Judge

Action upon option agreement for sale of stock. Judgment for defendant upon first cause of action. Affirmed.

Judgment for plaintiff on second cause of action. Reversed with directions to enter judgment for defendant on second cause of action.

James A. Wayne and W. H. Langroise for Appellant and Cross Respondent.

H. J. Hull and C. H. Potts, for Respondent and Cross Appellant.

OPINION—Filed December 15, 1939

BUDGE, J.:

This action was brought by A. C. Frost & Company, a Washington corporation, against Coeur d'Alene Mines Corporation, an Idaho corporation, upon a contract dated September 10, 1934, for the sale of one million three hundred thousand shares of the treasury stock of the Coeur d'Alene Mines Corporation at ten cents per share. This contract will be referred to as the option agreement. The complaint contains two causes of action growing out of the option agreement. The first cause of action is for the recovery of damages for an alleged breach of the option agreement. It might be here observed that the option agreement was in the first instance entered into between Coeur d'Alene Mines Corporation and one Boland and by the latter assigned to Frost & Company. The second cause of action was for money had and received by Coeur d'Alene Mines Corporation from the proceeds of the sale of treasury stock by an [fol. 365] officer of the Coeur d'Alene Mines Corporation under the option agreement, as modified by subsequent agreements. After trial of the action the trial court allowed an amendment to the second cause of action to conform to the proof, permitting recovery of an amount greater than that mentioned in the second cause of action as originally filed. Under the option agreement Frost & Company had the option to become the purchaser of all or any part of one million three hundred thousand shares of the treasury stock of Coeur d'Alene Mines Corporation at ten cents per share. The amount sought to be recovered under the second cause of action is the amount received by Coeur d'Alene Mines Corporation in excess of ten cents per share for stock sold by Nuzum, President of the Coeur d'Alene Mines Corporation.

The trial court denied recovery for the alleged breach of the option agreement contained in the first cause of action, entering judgment that Frost & Company take nothing on its first cause of action. Judgment was awarded in favor of Frost & Company on the second cause of action against the Coeur d'Alene Mines Corporation for the sum of $16,306, with legal interest thereon, aggregating the total sum of $19,132.38.

Frost & Company appealed from that portion of the judgment denying a recovery on the first cause of action and the Coeur d'Alene Mines Corporation appealed from that portion of the judgment allowing a recovery in favor of Frost & Company on the second cause of action.

In view of the determination hereinafter made of this case it will not be necessary to determine all of the assignments of error.

Assignments of error numbered 7 and 13 raise the point that the court was in error in determining that Frost & Company could not recover upon its first cause of action by reason of the fact that the option agreement was entered into in violation of the Securities Act of 1933 and acts amendatory thereof and supplementary thereto. The trial court held that both parties were charged with knowledge of the provisions of the Securities Act of 1933 and its amendments contained in the Securities Exchange Act of 1934, [fol. 366] 15 U. S. C. A. sections 77 and 78, and by reason of such fact and the provisions of the foregoing acts the option agreement was unenforceable as to its unexecuted parts. In other words, that Frost & Company could not recover as on a breach the market value of 805,150 shares of the treasury stock covered by the option agreement, remaining unsold on the 13th day of March 1936, by reason of the fact that the option agreement was unenforceable.

It appears unquestioned that the million three hundred thousand shares of treasury stock involved in this action and covered by the option agreement were not registered with the Federal Trade Commission or the Securities and Exchange Commission.

Section 77e of the Securities Act of 1933 provides:

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale * * *."

The evidence clearly supports the proposition that the dealings between Frost & Company and Coeur d'Alene Mines Corporation were in contravention of the foregoing section. However it is urged that such transactions as were carried on with respect to the option agreement and the securities involved were exempt transactions under section 77d of the Securities Act of 1933 providing:

"The provisions of section 77e shall not apply to any of the following transactions:

Transactions by an issuer not involving any public offering;"

The proof rather than sustaining the burden of showing that the transaction was exempted affirmatively shows that all the stock offered for sale amounted to public offerings and that interstate means of communication and transportation were used in connection therewith. Certainly the facts disclosed by the option agreement itself and the so called subsequent modifications by letter etc., and the many letters passing between Frost & Company and Coeur d'Alene Mines Company, recognizing that Frost & Com- [fol. 367] pany was selling the treasury stock to all and sundry, directing delivery of such treasury stock to other stock firms or brokers for sale to or by them flatly refutes such contention as does likewise the case of Securities and Exchange Commission v. Sunbeam Gold Mining Co., 95 F. (2d) 699.

The effect of nonregistration of the treasury stock referred to in the option agreement upon such contract is concisely stated in the Securities Act as amended by the Securities Exchange Act of 1934 and subsequent amendments, 15 U. S. C. A. section 78cc, as follows:

(b) *Every contract made in violation of any provision of this chapter* or of any rule or regulation thereunder, *and*

every contract (including any contract for listing a security on an exchange) heretofore or hereafter made *the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provisions of this chapter* or rule or regulation thereunder, *shall be void* (1) *as regards the rights of any person who, in violation of any such provision, rule or regulation shall have made or engaged in the performance of any such contract.* * * *" (Emphasis inserted.)

From the foregoing it appears beyond question that the option agreement, being a contract made in violation of, and the performance of which involved a violation of, the Securities Act as amended was void because so declared by the provisions of the Securities Act as amended.

The remaining question to be determined is the effect of the foregoing conclusion upon the two causes of action presented. As heretofore set forth the first cause of action seeks recovery for the difference between the contract price of the treasury stock as fixed by the option and the market price of the stock at the time of the alleged breach of the option with reference to 805,150 shares covered by the option agreement remaining unsold at the time of the alleged breach.

The second cause of action as originally stated was for money had and received, being the sums of money in excess of ten cents per share, as fixed by the option agreement, upon 90,000 shares of treasury stock covered by the option agreement sold by one Nuzum, President of the Coeur [fol. 368] d'Alene Mines Corporation to persons other than Frost & Company for nineteen cents per share. It being made to appear during the trial that the sales made by Nuzum as President of the Coeur d'Alene Mines Corporation thereafter amounted to the total sum of 147,800 shares instead of 90,000 as alleged in the complaint an amendment to conform to the proof was permitted by the trial court and recovery was allowed for the sum of $16,306.00, together with interest, in favor of Frost & Company and against the Coeur d'Alene Mines Corporation. Further clarification of the situation with reference to the second cause of action is contained in the brief of Frost & Company as follows: On page 27 it is said:

"Mr. Nuzum reported to Mr. Frost that he sold 90,000 shares at 19c per share, and Mr. Frost acquiesced with the

understanding that 10 per share should be applied on the option agreement, and $9000.00 placed to the credit of A. C. Frost and Company. Subsequently Mr. Nuzum stated that the stock he sold under the option agreement would run up to 100,000 shares. 147,800 shares were sold to others during the months of April and May, 1935, not including the sale of 80,000 shares to E. J. Gibson & Company and 20,000 shares to J. E. Jones Brokerage Company."

Again on page 16 of the brief of Frost & Company the following appears:

"In addition to these specific sales it (Coeur d'Alene Mines Corporation) received $10,000 for 100,000 shares of stock admittedly sold by R. W. Nuzum, and received much more stock sold by him, as the record show that 147,800 shares of the treasury stock were sold to others during April and May, 1935, not including the Gibson and Jones sales."

It thus appears that the second cause of action seeks recovery of that amount of money received by the Coeur d'Alene Mines Corporation over and above ten cents per share, as fixed by the option agreement, as the price to Frost & Company, from the sale of 147,800 shares of stock sold by R. W. Nuzum, President of Coeur d'Alene Mines Corporation. With reference to this cause of action Frost & Company virtually concedes its sole right to recover such sums is dependent upon whether or not the option agreement was still in force, the following being recited on page 78 of Frost & Company's brief with reference to the proceeds of the stock sold by Nuzum:

"If it was Frost's money, it was solely because the option agreement was still in force. It could not have been Frost's money or respondent and cross-appellant (Frost & Com- [fol. 369] pany) money under any other condition. Neither Frost nor respondent and cross appellant had any right to the stock or the proceeds of sales of stock except such rights as existed under the option."

While this recital would appear to determine that no right of recovery on the second cause of action exists by reason of the fact that the option agreement was not in force, being void, there likewise appears to be further rea-

son, amply supported by authority barring recovery upon either cause of action.

It should be borne in mind that the option agreement is void because prohibited by law. The well established rule is that if the contract is void because prohibited by law or as against public policy the courts will leave the parties in the identical situation in which it finds them, and the contract cannot be treated as valid by invoking estoppel. In McFall v. Arkoosh, 37 Ida. 243, 215 P. 978, this court said:

"At the close of the case it had been conclusively shown that the agreement upon which respondent relied in bringing this action was one forbidden by the regulations governing national forests. (1918 Use Book, p. 113, Reg. G-18) Both parties were conclusively presumed to know that the federal statutes authorized the Secretary of Agriculture to make regulations governing the grazing of stock on national forests. (U. S. Comp. Stats., secs. 823 and 5126), and the courts of this state take judicial notice of such regulations (C. S. sec. 7923; Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415.) Such regulations have the force and effect of law. (United States v. Grimaud, 220 U. S. 520, 31 Sup. Ct. 480, 55 L. Ed. 569; United States v. Eliason, 16 Pet. (U. S.) 291, 10 L. Ed. 968.)

The contract, being clearly in violation of the regulations governing national forests, no action could be maintained for its enforcement, and respondent, being in pari delicto with appellant, under the rule generally followed by the courts could not maintain an action for money paid pursuant to such an agreement. The law leaves such parties where it finds them. (Libby v. Pelham, 30 Ida. 614, 166 Pac. 575; Longle v. Snyder, 160 Fed. 627, 87 C. C. A. 529; 13 C. J. p. 492, sec. 440; 2 Page on Contracts, p. 1920, sec. 1089; 2 Elliott on Contracts, p. 344, sec. 1067.)"

To same effect: Deer Creek H. Dist. v. Doumeq H. Dist., 37 Ida. 601, 218 P. 371. In Libby v. Pelham, 30 Ida. 614, 166 P. 575, this court determined that rights based on a violation of law will not be enforced, and if a transaction is illegal because in contravention to a statute, it will not be upheld in any way, but the parties will be left in the situation in which they have voluntarily placed themselves. In Pacific Electric Ry. Co. v. Commonwealth Bond & C. Ins. Co., (Cal.) 204 P. 262, the rule is stated in the following [fol. 370] language:

"We may also concede the rule to be well settled that a party to an ultra vires contract will not be allowed to plead ultra vires while at the same time retaining benefits thereunder. This, however, only in part meets the objections made by Makely to the validity of the assignment. For there is a limitation upon the above rule to the effect that, where the contract is illegal or against public policy, the court will refuse to enforce it, and will leave the parties where it finds them, regardless of the fact that one of them may be retaining benefits received thereunder. Visalia Gas etc., Co. v. Sims, 104 Cal. 326, 37 Pac. 1042, 43 Am. St. Rep. 105. A contract that is unlawful as being against the express provisions or general policy of any particular statute is void and will not be enforced by the courts. See note to In re Assignment Mutual Guaranty Fire Insurance Co., 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. 149, at page 170, and cases cited thereunder. These legal principles become decisive of the present appeal, because under the Workmen's Compensation Act as it stood at the time of this purported assignment, there was the following provision:

'No claim for compensation shall be assignable before payment.' "

In Reno v. American Ice Mach. Co., (Cal.) 237 P. 784, dealing with a similar situation wherein a subscription agreement for corporate stock was held to be void because of the absence of a permit as prescribed by law for the corporation to issue said stock, it was said:

"The doctrines of estoppel by conduct and ratification have no application to a contract which is void because it violated an express mandate of the law or the dictates of public policy. Such a contract has no legal existence for any purpose, and neither action nor inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity. Colby v. Title Ins. etc., Co., 160 Cal. 632, 644, 117 P. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A 515; Lukens v. Nye, 156 Cal. 498, 505; et seq., 105 P. 593, 20 Ann. Cas. 158."

The case of McManus v. Fulton, (Mont.) 278 P. 126, 67 A. L. R. 690, considers the principles involved to some length and therein it is said in part:

" 'The great weight of authority is that where a party comes into court seeking to enforce a contract which is

against public policy or is prohibited by public law, the court wil refuse to aid either party and will leave them where they have placed themselves, and in refusing to enforce such contracts the court does not act for the benefit, of for the preservation of the alleged rights, of either party, but in the maintenance of its own dignity, the public good and the law of the state." And cases cited. Smythe v. Evans, 209 Ill. 376, 70 N. E. 906.

As we said in Glass v. Basin & B. S. Min. Co., 31 Mont. 21, 77 P. 302, quoting from Dean Lawson's article in 9 Cyc. [fol. 371] page 546; 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out, nor can he set up a case in which he must necessarily disclose an illegal purpose as the ground work of his claim. The rule is expressed in the maxims, "Ex dolo Malo non oritur action." and "In pari delicto prior est condition defendentis. The law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. (Citing many cases in accord.)"

See also cases cited in McManus v. Fulton, supra, and note thereto p. 716, 67 A. L. R.; National Union Indemnity Co., v. Bruce Bros. (Ariz.) 38 P. (2d) 648; Colby v. Title Ins. & Trust Co., (Cal.) 117 P. 915; Baker v. Couch, (Colo.) 221 P. 1089; Short v. Bullion-Beck & Champion Min. Co. (Utah) 57 P. 720; Morey v. Paladini (Cal.) 203 P. 760; Bowman v. Phillips, (Kan.) 21 P. 230; Dool v. First Natl. Bank of Calexico, (Cal.) 290 P. 15. The conclusion which must be reached is ably expressed in Hoffman v. McMullen, 45 L. R. A. 410, 28 C. C. A. 178, 48 U. S. App. 596, 83 Fed. 372, namely:

"If from the plaintiff's own showing or otherwise, the cause of action appears to arise ex turpi cause, or out of a transgression of a positive law of the country, then the court says he has no right to be assisted."

The judgment denying recovery upon the first cause of action is therefore affirmed. The judgment permitting re-

covery upon the second cause of action must be reversed and remanded with instructions to enter judgment in favor of Coeur d'Alene Mines Company, and it is so ordered.

Givens and Morgan, JJ., concur.

Ailshie, C. J., dissents from a reversal of the judgment.

Holden, J., dissents.

[fol. 372] IN SUPREME COURT OF IDAHO

[Title omitted]

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING—February 15, 1940

It is ordered that the opinion heretofore filed herein be and the same is hereby amended by striking from page 4 of said opinion the following:

The effect of nonregistration of the treasury stock referred to in the option agreement upon such contract is concisely stated in the Securities Act as amended by the Securities Exchange Act of 1934 and subsequent amendments, 15 U. S. C. A. section 78cc, as follows:

"(b) *Every contract made in violation of any provision of this chapter* or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made *the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter* or rule or regulation thereunder, *shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation shall have made or engaged in the performance of any such contract* * * *" (Emphasis inserted.)

From the foregoing it appears beyond question that the option agreement, being a contract made in violation of, and the performance of which involved a violation of, the Securities Act as amended was void because so declared by the provisions of the Securities Act as amended.

It is further ordered that respondent and cross-appellant's petition for rehearing be, and the same is hereby, denied.

[fol. 373] IN SUPREME COURT OF IDAHO

[Title omitted]

CLERK'S CERTIFICATE

I, Clay Koelsch, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the attached typewritten record, consisting of pages 1 to 361, inclusive, is a full, true, complete and correct copy of the transcript on appeal in the above entitled court from the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, to the Supreme Court of the State of Idaho, as the same was lodged and is now on file in the office of the Clerk of the Supreme Court of the State of Idaho.

I further certify that the opinion hereto attached, and for identification marked "Exhibit A", is a full, true, complete and correct copy of the decision of the Supreme Court of the State of Idaho, rendered and filed in said cause on the 15th day of December, 1939.

I further certify that on the 2nd day of January, 1940, the respondent and cross-respondent, A. C. Frost & Company, a corporation, filed in the Supreme Court of the State of Idaho, its petition for a rehearing in said cause and that [fol. 374] thereafter and on the 15th day of February, 1940, an order was entered in said cause modifying said original decision and that the attached order, marked for identification "Exhibit B", is a full, true, complete and correct copy of said order of February 15, 1940.

Witness my hand and the seal of said court, at Boise, Idaho, this 7th day of May, 1940.

Clay Koelsch, Clerk of the Supreme Court of the State of Idaho. (Seal of Supreme Court, State of Idaho.)

[fol. 375] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD

It is hereby stipulated and agreed by and between the parties hereto, by their attorneys, that the following portions of the record certified by the Supreme Court of Idaho to the Supreme Court of the United States may be omitted

from the record printed by the Clerk of the Supreme Court of the United States:

(Where omissions are stated to be, e.g., "lines 1-25", the omission designated includes both line 1 and line 25; and the same is true as to pages.)

Page	Lines
104	3–30
105–115	All
124	14–30
125–131	All
132	1–14

H. J. Hull, Attorneys for Petitioner. James A. Wayne, W. H. Langroise, Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Idaho is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

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FILED
MAY 15 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1010 78

A. C. FROST & COMPANY,
Petitioner,

vs.

COEUR D'ALENE MINES CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO.

ERNEST L. WILKINSON,
CHARLES J. KAPPLER,
JOHN W. CRAGUN,
Counsel for Petitioner.

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H. R. Rep. No. 85, 73d Cong., 1st Sess. 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1010

A. C. FROST & COMPANY,

Petitioner,

vs.

COEUR D'ALENE MINES CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

A. C. Frost & Company, by its attorneys, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Idaho entered in the above cause on December 15, 1939.

Opinions Below.

The trial court rendered no written opinion, but adopted findings of fact and conclusions of law which appear at R. 205-218.

The opinion of the Supreme Court of the State of Idaho (R. 226), as modified following a petition for rehearing

(R. 235), appears in 98 P. (2d) 965, and is not yet officially reported.

Jurisdiction.

The judgment of the Supreme Court of the State of Idaho was entered December 15, 1939 (R. 226). A petition for rehearing was entertained; and the opinion originally announced was modified February 15, 1940 (R. 235), at which time the petition for rehearing was denied.

The statutory provision believed to sustain the jurisdiction of this Court is Section 237(b) of the Judicial Code, as amended. The statute of the United States which is involved is the Securities Act of 1933 (Act of May 27, 1933, c. 38, Title I, 48 Stat. 74, 77 §§ 4 and 5, Title 15 U. S. C. §§ 77 d, e). The judgment of the Supreme Court of the State of Idaho directs entry of a final judgment against petitioner. It is, therefore, final for purposes of this Court's jurisdiction. *Mower* v. *Fletcher*, 114 U. S. 127. The Supreme Court of the State of Idaho founded its decision on its interpretation of the Securities Act of 1933, holding that a contract for the sale of stock not registered under the Securities Act of 1933 is void as violative of the spirit or intent of that act. The question involved has not heretofore been passed upon by this Court. No provision of the Securities Act of 1933 purports to declare such a contract void; and counsel have found no opinion except that here sought to be reviewed which supports the decision below. The Federal question is, therefore, substantial. *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 105; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 716.

Questions Presented.

1. Whether an option under which shares of mining stock may be purchased from time to time is invalid as to the vendee where the vendor has failed to register the stock

with the Securities and Exchange Commission under the provisions of the Securities Act of 1933.

2. Whether one who takes an option to purchase all the shares of stock of a corporation remaining in its treasury (1,300,000 shares out of 3,000,000 authorized) and who subsequently waives the right to take some of the shares so the issuer can sell them to others is engaged in a transaction "involving any public offering" (Sec. 4 [1], clause 2, of the act).

Statutes Involved.

Section 5 of the Securities Act of 1933 (15 U. S. C. §77e), sec. 38, 48 Stat. 74, 77 provides:

"SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

"(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

"(b) It shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10 [15 U. S. C. § 77j].

"(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for

the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10 [15 U. S. C. § 77j]."

Section 4 of the Securities Act of 1933 (15 U. S. C. § 77d) provides as follows:

"The provisions of section 5 [15 U. S. C. § 77e] shall not apply to any of the following transactions:

"(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 [15 U. S. C. § 77h] is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

"(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders."

Other provisions of the Securities Act of 1933 are copied in the appendix.

Statement.

Petitioner commenced this action against respondent in an Idaho state court to recover for breach of a contract (entered into with one Boland on September 10, 1934 and assigned by him the same day to petitioner). The contract (R. 175; 210) provided that, upon the monthly payment of certain sums, petitioner might acquire lots of stock at 10

cents a share up to the total of 1,300,000 shares held in the treasury of respondent company (R. 176). The stock of respondent was not registered with the Securities and Exchange Commission (Finding 10, R. 215). During the month of June, 1935, respondent refused further to deliver stock to petitioner, giving as the excuse for its refusal the want of registration of the stock with the Securities and Exchange Commission under the Securities Act of 1933 (R. 215). However, the contract (as modified, R. 212-213) was substantially complied with so far as petitioner's obligations were concerned until the payment due October 10, 1935 (Finding 8, R. 214). On March 13, 1936, respondent notified petitioner of the termination of the agreement on the ground that petitioner had failed to comply with the option agreement (R. 215).

Petitioner's president made every effort to have respondent register the stock with the Securities and Exchange Commission (R. 47), even securing registration forms and filling them up as far as he could (R. 61). There is no evidence that petitioner violated the Securities Act of 1933 by selling any of the shares which it acquired from time to time (R. 64). However, respondent (or its president, Nuzum) did make some sales of its treasury stock to certain brokers and, perhaps, others (R. 214). Since these sales were out of treasury stock to which petitioner was entitled, it was necessary to secure a waiver by petitioner of its right to take the shares; and this was done under an agreement whereby the petitioner was to be credited with the difference between the price received by respondent and the 10 cents which petitioner would have had to pay for the shares under the option agreement (R. 213).

The trial court entered findings of fact and conclusions of law (R. 205-218), denying petitioner any relief on the unexecuted portion of its contract (involving some 805,150

shares of stock (R. 215)), but allowing petitioner judgment for $16,306, with interest, as to the shares which had been sold by respondent itself (or Mr. Nuzum) to others than petitioner (R. 218). Both sides appealed; and the Supreme Court of Idaho, by a divided bench, affirmed as to that part of the judgment which denied petitioner recovery for damages arising out of the unexecuted part of the contract; and reversed the judgment so far as it was in favor of petitioner, it being its view that the contract was void for failure to register the shares under the Securities Act of 1933, so that the parties would be left where they were found (R. 226-235, 235).

Specification of Errors to be Urged.

1. The court erred in holding that the contract of September 10, 1934, as modified, violates the Securities Act of 1933.

2. The court erred in holding that the contract of September 10, 1934, as modified, is void.

3. The court erred in holding that the contract of sale and purchase of the shares of stock involved is not exempt from the provisions of Section 5 of the Securities Act of 1933 by reason of Section 4 of said Act.

4. The court erred in failing and refusing to enter judgment for petitioner.

5. The court erred in entering judgment for respondent.

6. The court erred in finding and holding that petitioner sanctioned the sale of treasury stock to all and sundry.

Reasons for Granting the Writ.

The decision below involves the determination of an important question of Federal law which has not heretofore been determined by this Court. The questions involved are

of public importance. This Court has taken no opportunity to pass on the Securities Act of 1933 except in the case of *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1. The present case broadly involves the spirit and purpose of the act—for unless found in such spirit and purpose there is nothing in the act which declares contracts for the purchase of unregistered securities to be void. A proper exposition of the intent of the act is of great public importance, since practically all financing enterprises come face to face with that act.[1]

1. We are to remember that the Securities Act of 1933 is the so-called "truth in securities" law. The public purposes of the act are not served by permitting one who has failed to register its securities in accordance with the provisions of that act to profit from its violation by avoiding the consequences of its contract. See *Logan County Bank* v. *Townsend*, 139 U. S. 67, 75-76, and cases cited. Certainly the duty to register the stock, if one was present here, was on respondent. An examination of Section 6(a) (15 U. S. C. §77f), which covers "registration of securities and signing of registration statement," as well as of the act as a whole, will disclose that it was contemplated that the duty of registering was on the issuer (respondent). Section 12(2) (15 U. S. C. §77*l*) of the act gives to the purchaser (petitioner) alone, and not to the issuer (respondent), the right of rescission in the event of non-registration, provided certain facts are shown; but the contract is not declared void. It therefore appears that the decision below is in conflict with the statute itself, and sets at naught the purposes of

[1] When the question is presented as to whether a contract is void by reason of its execution in violation of a statute, the court must consider the entire statute generally, and its aims specifically, to determine whether the legislature intended to make such a contract void. *Harris* v. *Runnels*, 12 How. 79, 84; *National Bank* v. *Matthews*, 98 U. S. 621, 627; *Thompson* v. *St. Nicholas National Bank*, 146 U. S. 240, 251.

Congress expressly set forth. To allow respondent to hide behind the statute by repudiating the contract permits the statute to be used as a cloak for fraudulent operations.

The notion of the court below that the contract is invalid apparently was inspired by the provisions of an entirely different act (R. 229). It quoted provisions of the Securities Exchange Act of 1934, Section 29 (15 U. S. C. §78cc) which provides that every contract made in violation of that act and every contract which involves a violation of any provisions of the Act shall be void as regards the rights of any person, who, in violation of any such provision shall have made or engaged in the performance of any such contract. But the Securities Exchange Act of 1934 concerns entirely different subject matter, and the provisions relied on by the court below were inserted in the act by amendment (Act of May 27, 1936, c. 462, 49 Stat. 1375, 1377, §3), to be effective 90 days after its enactment (§13), subsequent in time to all the transactions herein involved. This ground of the decision was struck out following the petition for rehearing (R. 235). The court below thus removed the basis of its original decision without changing its erroneous conclusion. The court below ought to have realized that since the Securities Act of 1933, which is alone applicable, contains no remotely similar provision, a like effect was not intended with respect to contracts involving application of the provisions of the Securities Act of 1933 —even assuming that the contract involved did contemplate violation of that act. A different purpose is to be understood with respect to the Securities Act of 1933 in its entire structure and theory. The central purpose of that act is to ensure publicity of the factors involving value of stocks—not to prohibit dealings in stock. H. R. Rep. No. 85, 73d Cong. 1st Sess., *passim*. What the act strikes

against by civil liability is false statements of fact to the investing public. *Ibid*, p. 9.

The Securities Act of 1933 establishes its own penalties for failure to comply with its provisions. The penalty of making contracts void is not among those stated by the act. It is well settled that where a statute provides penalties for its violation the judiciary may not add a further penalty of its own making by declaring a contract to be void. *Fritts* v. *Palmer*, 132 U. S. 282, 289; *National Bank* v. *Matthews*, 98 U. S. 621, 627; *Dunlop* v. *Mercer* (C. C. A. 8th, 1907), 156 Fed. 545; cf. *Thompson* v. *St. Nicholas National Bank*, 146 U. S. 240, 251; *Logan County Bank* v. *Townsend*, 139 U. S. 67, 75-76. As was said in *Hobbs* v. *McLean*, 117 U. S. 567, 579, "When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."

The cases cited by the court below to sustain its holding that the contract is void because in contravention of positive law, were decided on the ground that there had been a violation in which the parties were in *pari delicto*, and so the law would leave them where it found them. Here the violation of the statute (failure to register), assuming there were a violation (see *infra*), is the unilateral fault of the issuer (respondent). The transaction involves a public offering or else it does not. If it does not, then the provisions of Section 5 are inapplicable [2]—in which event the failure to register is immaterial. If, on the other hand, it did involve a public offering, then the purchaser (petitioner) is of the class for the protection of which the act was adopted, so that the failure of respondent to register cannot be pleaded against petitioner.

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[2] Sect. 4(1) exempts transactions not involving any public offering.

Furthermore, the contract did not involve or contemplate any violation of the Securities Act of 1933. The mere contract for the sale of stock which is not already registered with the Securities and Exchange Commission does not give rise to a violation of the act. That act prohibits the use of the mails or instruments of interstate commerce to sell or offer to buy, or to carry, an unregistered security which involves a public offering. This contract did not contemplate, certainly so far as petitioner is concerned, any public offering of the stock. It was a sale by which petitioner was to take a large block of shares. It did not contemplate using the mails or instruments of interstate commerce in connection with any public offering as to stock which was not registered. It did not contemplate the non-registration of the stock;[3] and there is no showing whatever that respondent might not, for aught the contract provided, have registered the stock, or that petitioner did anything which might embarrass such registration. The evidence affirmatively shows just the reverse. Petitioner did all it could to aid and induce respondent to register the stock. R. 47, 61; Plaintiff's Exhibits 35, 37-42, inclusive; Defendant's Exhibits 44, 63 (all exhibits are on file with the Clerk of this Court). If there is any inference possible from the contract (R. 175; Plaintiff's Exhibit No. 9) it is only that respondent acted fraudulently in representing that it was authorized to sell and deliver the stock. The contract is "instinct with the obligation" on the part of respondent to register.

2. The contract involved in this case is exempt from any taint of illegality under Section 5 by virtue of the express provision of Section 4(a). Clause 2 of Section 4(a) pro-

[3] Any provision of a contract calling for non-registration of a security (but not, *semble*, the contract apart from such provision) would be void by the express declaration of Section 14 of the act.

vides that Section 5 shall not apply to "transactions by an issuer not involving any public offering." The court below held that this transaction constituted a "public offering," relying on *Securities & Exchg. Comm.* v. *Sunbeam Gold Min. Co.* (C. C. A. 9th, 1938), 95 F. (2d) 699. That case was a suit by the Securities and Exchange Commission itself to restrain issuance of unregistered securities. The issuer defended on the theory that, since the securities were to be sent only to certain shareholders of the issuer and of another company, the issue was not a "public offering." The Ninth Circuit Court of Appeals held, however, that Congress specifically intended to include within the term "public offering" sales of stock to shareholders unless they were so few that the sale to them would not constitute a "public offering". (citing and quoting the conference report of the House of Representatives at the time the act was passed). In that case, however, there were proposed sales to 530 individuals, shareholders in the two companies. In the present case, so far as petitioner's intent was concerned, there was a sale to but one person (petitioner), and petitioner, as was testified below (R. 64, 87), did not wish to and did not sell any of the shares which it received. It is true that, because petitioner was in some financial difficulties, it waived its right to take certain of the treasury shares so that respondent (or its President, Mr. Nuzum) might sell them. These sales were primarily to two brokerage firms; but respondent itself is guilty of any violation of the act in this respect, and it is impossible to see how the Federal law can permit a defendant to plead its own violation of that law in avoidance of its obligations.

But even if petitioner itself had resold some of the shares which it purchased from respondent, no violation of the act would be involved. For petitioner is not an "issuer, underwriter, or dealer" within the meaning of clause 1 of

Section 4(a) of the act; and, unless it is one or the other, its sales would have been expressly exempt from Section 5. It has never been suggested that petitioner is a dealer (§ 2[12] of the act), since it has not conducted the business of offering, etc. or otherwise dealing or trading in securities issued by another person. Nor is it an underwriter, since it did not purchase securities from respondent with a view to their distribution (§ 2[11] of the act). If it were held that petitioner is an issuer within Section 2(4) of the act, the holding would conflict with the rationale of the decision in *Landay* v. *United States* (C. C. A. 6th, 1939), 108 F. (2d) 698, 704, wherein the Sixth Circuit Court of Appeals is apparently of the opinion that the only persons, beyond the person actually obligated by the terms of the security, who can be considered "issuers" are those persons who completely dominate the corporation so that the acts of the corporation were their individual acts. As is apparent from the course of the proceedings in this case, including the repudiation of petitioner's contract, certainly petitioner far from dominated respondent.

Conclusion.

It is respectfully submitted that the writ should be granted.

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CHARLES J. KAPPLER,
JOHN W. CRAGUN,
Counsel for Petitioner.

APPENDIX.

Miscellaneous provisions of the Securities Act of 1933, c. 38, 48 Stat. 74, as amended (15 U. S. C. § 77a *et seq.*)

SEC. 2 (15 U. S. C. § 77b):

"(4) The term 'issuer' means every person who issues or proposes to issue any security; * * *"

"(11) The term 'underwriter' means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. * * *"

"(12) The term 'dealer' means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person."

SEC. 6 (15 U. S. C. § 77f):

"(a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the under-

writer of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this subchapter. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered."

SEC. 12 (15 U. S. C. § 771):

"Any person who— • • •

(2) sells a security (whether or not exempted by the provisions of section 77c, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction. to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

SEC. 14 (15 U. S. C. § 77n):

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

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OCTOBER TERM, 1940

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The opinion of the Supreme Court of the State of Idaho (R. 226), as modified following a petition for rehearing (R. 235), appears in 98 P. (2d) 965, and is not yet officially reported.

Jurisdiction.

The judgment of the Supreme Court of the State of Idaho was entered December 15, 1939 (R. 226). A petition for rehearing was entertained; and the opinion originally an-

nounced was modified February 15, 1940 (R. 235), at which time the petition for rehearing was denied. The petition for certiorari was filed in this Court May 15, 1940. The writ of certiorari was granted October 14, 1940.

The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code as amended. The statute of the United States which is involved is the Securities Act of 1933 (Act of May 27, 1933, c. 38, Title I, 48 Stat. 74, 77 §§4 and 5, Title 15 U. S. C., §§ 77 d, e). The judgment of the Supreme Court of the State of Idaho directs entry of a final judgment against petitioner. It is, therefore, final for purposes of this Court's jurisdiction. *Mower* v. *Fletcher*, 114 U. S. 127. The Supreme Court of the State of Idaho founded its decision on its interpretation of the Securities Act of 1933, holding that a contract for the sale of stock not registered under the Securities Act of 1933 is void as violative of the spirit or intent of the Act, and that the transaction is not exempted by that Act. The question involved has not heretofore been passed upon by this Court. No provision of the Securities Act of 1933 purports to declare such a contract void; and counsel have found no opinion except that here sought to be reviewed which accords with the decision below.

The federal question is, therefore, substantial. *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 105; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 716. Whether a contract is illegal under a Federal statute is a federal question which this Court has jurisdiction to review. *Awotin* v. *Atlas Exchange Nat. Bank*, 295 U. S. 209, 213.

Questions Presented.

1. Whether an option to purchase directly from the issuing company certain shares of its stock from time to time is void as to the purchaser where the issuer has failed to register the stock with the Securities and Exchange Commission under the provisions of the Securities Act of 1933.

2. Whether a transaction under which one who takes an

option to purchase substantially all the shares of stock of a corporation remaining in its treasury and who subsequently waives the right to take some of the shares to permit their sale to others, is a transaction "involving any public offering" (Sec. 4(1), clause 2, Securities Act of 1933).

Statutes Involved.

The statutes involved are set forth in the appendix, *infra*, pp. 29-33.

Specification of Errors to be Urged.

The specifications of errors to be urged are set forth in the appendix, *infra*, p. 33.

Statement.

This was an action brought by petitioner against respondent in an Idaho state court to recover for breach of a contract by which respondent was to sell certain stock to petitioner. Respondent defended on the ground, among others, that the original agreement of the parties was entered into in violation of the Securities Act of 1933, in that the shares of stock attempted to be sold "had never been registered for sale under said National Securities Act, or Acts amendatory thereof or supplemental thereto, with the Securities & Exchange Commission", and that "said contract was void, ab initio" (R. 186). Other grounds of defense were bottomed on non-federal questions.

The findings of the trial court (R. 205-218) may be summarized as follows:

Respondent entered into a contract September 10, 1934, with one Boland, wherein respondent undertook to sell, of its 3,000,000 shares authorized capital stock, the 1,300,000 shares of stock which remained in its treasury at 10 cents a share, payments to be made from month to month as specified, and shares to be issued as paid for, without liability on the part of the purchaser for failing to purchase the entire lot of 1,300,000. (Throughout, this has been referred

to as the option agreement.) Finding 3, R. 209. Respondent represented that it was authorized to sell and deliver the 1,300,000 shares of treasury stock upon such terms as it might deem proper. *Id.* On the same day, Boland assigned the contract to petitioner; and petitioner acted and was accepted as the owner of the option granted by the contract. Finding 4, R. 210. In the negotiation of the contract Boland had acted as agent for the plaintiff. *Id.* The option agreement was thereafter modified as to dates and amounts of monthly payments on April 26, 1935. Finding 5, R. 211. On May 15, 1935, petitioner and respondent agreed that proceeds from the sale of treasury stock[1] after the sale of the next twenty thousand shares should be retained in respondent's treasury for the purpose of speedy development of the mining property of respondent and purchase of equipment, purchase of additional mining property (the "Mineral Point Mine") and reimbursement of certain advances to respondent and the construction of a mill within six months. Finding 6, R. 212. It was further agreed that all credits over and above 10 cents per share would be placed to petitioner's credit with interest at 6% per annum, to be reimbursed to petitioner from the first earnings of the property. *Id.* Amounts realized from the sale of treasury stock by Mr. Nuzum (respondent's President) were to remain in the treasury of respondent, crediting petitioner for the proceeds over 10 cents per share. *Id.* Payments in accordance with the option agreement as modified totalling $16,500 (for which petitioner received 165,000 shares of stock) were made from month to month from September 10, 1934, to March 22, 1935. Findings 7 and 8, R. 213. In

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[1] These sales of stock to others than petitioner apparently were not contemplated in the original agreement, but came subsequently when petitioner had encountered some trouble in meeting the terms of the agreement as originally undertaken. See the statement of facts in addition to the specific findings of the trial court, *infra*, pp. 6-8.

addition, petitioner caused to be paid to respondent the option price of 10 cents per share for 279,850 shares of the treasury stock sold to other parties than the petitioner.[2] Included in these sales were sales of 80,000 shares to E. J. Gibson & Company on May 8, 1935, and 20,000 shares to J. E. Jones Brokerage Company in June, 1935. These payments received by respondent were sufficient to pay the amounts due under the option agreement through the payment due in July, 1935, leaving $500 to apply on the August, 1935, payment. The proceeds of sales of stock made to others than petitioner were sufficient to meet payments up to and including that due on October 10, 1935. Finding 8, R. 214. By reason of the petitioner's inability to finance purchase of the stock and to have the stock registered with the Securities & Exchange Commission, petitioner abandoned the option to purchase the remainder of stock covered by the agreement in the summer of 1935. Finding 9, R. 214; Finding 11, R. 215. During the month of June, 1935, respondent refused to deliver more stock to petitioner on the ground that the stock had not been registered with the Securities and Exchange Commission, and refused to perform the agreement further until authority was obtained for the sale of the stock under the Securities Act of 1933. Finding 10, R. 215. The shares of stock of respondent covered by the option agreement were never registered for sale under the Securities Act of 1933. *Id.* On March 13, 1936, respondent notified petitioner of the termination of the option agreement on the ground of failure by petitioner to perform. Finding 11, R. 215. Petitioner had failed to perform the contract even though respondent had not refused to perform nor repudiated its obligations by the notice in June, 1935. *Id.* Mr. Nuzum (respondent's President) sold 90,000 shares of treasury

[2] A complete statement covering the 279,850 shares, as prepared by respondent, appears as Exhibit 74. Testimony covering this Exhibit appears (R. 94-95).

stock at 19 cents per share and 89,850 shares of treasury stock at various prices, in accounting for which respondent owes petitioner $16,306.[3] Finding 16, R. 216. The court concluded that the option agreement of September 10, 1934, was entered into in violation of the Securities Act of 1933 and is not enforceable as to unexecuted portions thereof; that petitioner had abandoned the option agreement in the summer of 1935 and forfeited its rights under the option agreement with respect to further performance; and that petitioner was not entitled to judgment save for the $16,306 mentioned above. R. 218.

From the judgment predicated on the foregoing findings and conclusions, both parties appealed to the Supreme Court of Idaho.

A further statement of matters established by the record will be of assistance in understanding some features of the Federal question involved:

At the time petitioner took the option to purchase the shares in the treasury of respondent, respondent owned an option to purchase certain mining properties (referred to throughout the record as the Mineral Point Group). R. 175. The purpose of the sale of respondent's shares contemplated by petitioner's option seems to have been to develop and equip the Mineral Point Mine. R. 177. When petitioner ran into difficulties financing the purchase of the shares, he at first secured an extension of the terms of the option, not wishing to market any stock. Although the stock was selling on the market at twice the option price, petitioner did not want to market any of the stock and Mr. Nuzum had agreed that it should not be marketed until it had value

[3] How this is arrived at is not stated in the findings of the trial court. The amount found due represents the difference between 10 cents per share which petitioner would have had to pay under the option agreement and the amount received by respondent upon the sales through its president to others than petitioner. These shares are part of the lot of 279,350 shares mentioned in Finding 8 (R. 214). See Exhibit 74.

sufficient to pay for the property. R. 64. Petitioner agreed to release stock from its option in order that it might be used as part of the purchase price for the Mineral Point Claims. Ex. 37. The modification of the petitioner's option May 11, 1935, contemplated use of the money received from sale of shares for the purpose of paying for the Mineral Point Mine. R. 212. Petitioner's president pointed out the necessity of completing the purchase of the Mineral Point property. Ex. 33; *cf.* Exs. 35, 37. Sale of the stock was apparently considered by the parties as a means of securing the money necessary for this purchase. Exs. 37; 38. To accomplish that, there was recognized the necessity for registering the stock with the Securities and Exchange Commission and listing on a stock exchange; and accordingly, petitioner's president wrote many letters to respondent, emphasizing the importance of registering the stock. R. 41 *et seq.*; see Exs. 33, 34, 35, 36, 37, 38, 39, 40, 68, 41, 64, 65. Although obviously only respondent could actually execute the registration statement, petitioner secured the forms of application for listing and registration of the stock. Ex. 37. He even prepared the forms so far as he could, making copies of papers to accompany the blanks.[4] R. 61; Ex. 39. Ultimately petitioner was advised by respondent that the stock could not be listed with the Securities Exchange for the reason that "we would have to show title to the property or the certificate will not be granted".[5] Ex. 63.

There is no evidence to show that petitioner sold the shares which it acquired under the option, or that it bought them for resale. There is evidence to show that petitioner

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[4] Respondent's president, Mr. Nuzum, was an attorney at law (R. 142). Apparently petitioner's president, Mr. Frost, entertained the notion during part of this time that listing on a stock exchange did away with the necessity for registering the stock under the Securities Act (Ex. 36).

[5] It is to be understood that Mr. Nuzum was talking of the Mineral Point property, as to which respondent had only an option.

either sold itself or acquiesced in the sale by respondent of certain shares to which it would have been entitled under the option, and shared in the proceeds of such sales, these sales being to E. J. Gibson & Co. (80,000 shares) and J. E. Jones Brokerage Co. (20,000 shares). See *infra*, p. 26, note 19. It also appears that petitioner "acquiesced" in the sale by respondent's president Nuzum of some 90,000 shares, although petitioner did not, apparently, have anything to do with the making of those sales.[6] R. 37

The record is deficient in explaining the purposes the parties may have had in mind in entering into the option agreement. It is not shown that this was an underwriting enterprise, whereby petitioner was to take and retail an entire issue of stock in exchange for immediate operating capital given to respondent, or agreed to take so many shares as respondent could not sell to the public. On the other hand, the record does not satisfactorily show that petitioner bought the stock purely as an investment. It is shown that after the option agreement had been in force some months, sales of some of the shares were contemplated in order to finance development of the property, and that petitioner was anxious to have the stock registered and listed on a stock exchange so that sales could be made of the remaining treasury stock not taken up by petitioner.

Upon the respective appeals of the parties, a majority of the Supreme Court of Idaho thought that the dealings between petitioner and respondent were in contravention of Section 5(a) of the Securities Act of 1933 providing against use of interstate means of communication, transportation or

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[6] As a matter of fact, petitioner did not even know the extent of those sales until the trial below. Thus, petitioner had alleged the sale by respondent of 90,000 shares (R. 174). But at the trial it developed (R. 95, 118-123, Ex. 74) that respondent's president had sold the larger number, and had credited petitioner with the excess received over the purchase price. Accordingly, petitioner was allowed (R. 204) to amend its complaint to accord with the proofs.

the mails in connection with sales or deliveries of securities. It thought that there was no exemption from this provision by reason of Section 4, which exempts transactions by an issuer not involving any public offering. As showing that the contract was void, it relied upon the provisions of an entirely different act (Securities Exchange Act of 1934) which declares void every contract the performance of which involves violation of the provisions of that act.[7] The majority of the Court thought that since the option agreement was void because prohibited by law or public policy, the court would leave the parties in the identical situation in which it finds them and the contract cannot be treated as valid by invoking estoppel. The court, therefore, reversed the judgment which had been granted petitioner for the profits realized by respondent on sales of stock to which petitioner was entitled before the option was claimed to have lapsed; and it affirmed as to the cause of action seeking damages for the claimed breach of the contract.

Summary of Argument.

1. The court below held the contract in suit void on grounds of public policy. Public policy is primarily for the lawmakers to determine. There is no express provision of the Securities Act of 1933 which declares contracts for the sale of unregistered securities void. Accordingly, the court must consider the entire statute generally and its aims specifically to determine whether the legislature intended to make the contract void. In such cases this Court has looked to the purposes and policy of the legislative to determine the policy of the law, and has held contracts enforcible or illegal in accordance with the policy so found. Since Congress has dealt with the effect of violations of

[7] This ground of the decision was eliminated following the petition for rehearing (R. 235).

the act upon contracts to sell unregistered shares, the court may not add a penalty of its own making (by declaring the entire contract void) to the penalties decreed by Congress.

This case involves no question of the right of a purchaser to rescind, or of the right of the Securities and Exchange Commission on behalf of the public to enjoin violations of the act or compel registration of securities. Nor does it involve any question of criminal violation of the act.

2. Section 14 of the act declares void only those provisions or conditions which bind a purchaser of securities to waive compliance with any provision of the act. The contract in suit contains no such provision but affirmatively represents that respondent is authorized to sell and deliver the securities. Accordingly, the obligation to register was assumed by respondent in the contract it now attacks. Section 12 of the act recognizes that securities may be sold without a registration statement being in effect and determines the consequences which shall flow from such sales. No further consequence, as declaring invalid an agreement for sale of unregistered stock, was contemplated by Congress.

The policy of the Securities Act is to enforce truth in the sale of securities, not to prohibit dealings in securities. The legislative history of the act recognizes this, and also shows that registration was not essential to dealings in securities. The policy of Congress was to make those who failed to register substantially insurers of the value of the securities as to members of the public deprived of information. But no intent on the part of Congress to prohibit such dealings can be found.

By the act the duty to register was on respondent; only respondent could accomplish the registration. Accordingly, the policy of Congress is not served by permitting respondent to escape its obligations by pleading its violation of the

statute. The decision below would encourage violation of the act, and in any event does not accord with the purposes of Congress.

The fact that Congress did not intend to declare dealings in securities unlawful if the securities were not registered is shown by acts *in pari materia* with the Securities Act of 1933. Securities Exchange Act of 1934, § 29; Trust Indenture Act of 1939, § 327; Act regulating over-the-counter brokers and dealers, June 25, 1938, c. 677, 52 Stat. 1070, 1076, § 3.

Cases under state blue sky laws show a varying policy on the part of the states and varying statutory provisions and legislative policies as to whether contracts to deal in unlicensed securities shall be void, voidable, or valid and enforceable.

3. The court below held the stock ought to have been registered and was not exempt from registration under Section 4(1) of the Securities Act. It thought that petitioner was "selling the treasury stock to all and sundry", so that the transaction involved a "public offering".

The only offer involved was the offer of respondent in the option agreement to sell all of its treasury stock to but one person, petitioner. The offer was not to the public. No issue is properly in the case as to whether sales of stock to others than petitioner were made to the public or were made pursuant to a public offering; and those sales do not concern the question whether the securities ought to have been registered before they were sold to petitioner.

Whether an offering is a "public offering" is largely a question of fact; and the offering is to be distinguished from the sale. Here, however, there was an offering to but one person who possessed a special knowledge of respondent and took particular interest in respondent's affairs. The transaction with petitioner is expressly exempt as a public

offering under Rule 152 of the Securities and Exchange Commission.

Furthermore, there is nothing in the record to support the statement of the court below that petitioner was "selling the treasury stock to all and sundry".

Securities and Exchange Commission v. *Sunbeam Gold Mining Co.*, C. C. A. 9, 1938, 95 F. (2d) 699, does not support the decision in this case; for here there is an offering of all the shares to petitioner, which put it beyond the power of respondent to offer any shares to the public while the agreement remained unchanged. The subsequent amendment of the agreement to permit sales of the shares to other than petitioner does not affect the result, since it will not be presumed that those sales were to be made in violation of law.

ARGUMENT.

I.

Analysis of Question Presented.

The Supreme Court of Idaho held that the contract involved was within the purview of the Securities Act of 1933; that it violates that act, in that the stock was not registered as required by the act; and that it is, therefore, void on grounds of public policy. If the contract comes within the requirements of §5 of the Securities Act for registration of stock, the question is whether respondent, who issued the stock, shall escape its contract by reason of the fact that it failed to register the stock. Or stating it another way, the question is: What public policy requires that this contract be held void?

Public policy is primarily for the lawmakers to determine. *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 357. Primarily, therefore, we are to refer to the Securities Act of 1933 to determine whether Congress intended to make an option agreement such as that here involved.

void. There is no provision in the Securities Act of 1933 which declares contracts for the sale and purchase of unregistered securities to be void (nor even a provision which forbids the formation of such contracts).

In such circumstances the court must consider the entire statute generally and its aims specifically to determine whether the legislature intended to make the contract void. *Harris* v. *Runnels,* 12 How. 79, 84; *Union Nat. Bank* v. *Matthews,* 98 U. S. 621, 627; *McBroom* v. *Scottish Mtg. & Land Inv. Co.,* 153 U. S. 318, 323; *Union Gold Mining Co.* v. *National Bank,* 96 U. S. 640, 641. *Cf. Thompson* v. *St. Nicholas National Bank,* 146 U. S. 240, 251; *Burck* v. *Taylor,* 152 U. S. 634, 648. Many cases typify the application of this rule. Time and again when this Court has had under consideration the question whether a contract was invalid because it contravened a statute (though the statute did not expressly make contracts invalid),[8] the Court has looked to the purposes and policy of the legislative in order to determine whether invalidity of the contract accords with that policy. Where the policy of Congress has not required that a contract be struck down, the Court has enforced it. *Harris* v. *Runnels,* 12 How. 79, 83-84, *et passim*; *Union National Bank* v. *Matthews,* 98 U. S. 621, 627; *National Bank* v. *Whitney,* 103 U. S. 99, 102; *Union Gold-Mining Co.* v. *National Bank,* 96 U. S. 640, 642; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 550, 551; *Bement* v. *National Harrow Co.,* 186 U. S. 70, 88, 94; *Cincinnati P., B. S. & P. P. Co.* v. *Bay,* 200 U. S. 179, 185; *Hobbs* v. *McLean,* 117 U. S. 567, 575, 576. *Cf. Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 235, 236, 237; *McNair* v. *Knott,* 302 U. S. 369, 371.

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[8] We may lay out of consideration the many cases which hold that a contract expressly made void by statute can be enforced by neither party. See, *e. g., Embrey* v. *Jemison,* 131 U. S. 336, 344-346; *Brown* v. *Tarkington,* 3 Wall. 377, 381; *Stansbury* v. *United States,* 8 Wall. 33, 36-37.

Where, however, it has been found that it was within the purpose or policy of Congress to hold the contract illegal, it has not been enforced at the instance of a wrongdoer. *Davidson* v. *Lanier*, 4 Wall, 447, 454-455; *Hannay* v. *Eve*, 3 Cr. 242, 247-248; *Awotin* v. *Atlas Exchange Nat. Bank*, 295 U. S. 209, 212; *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 468, 477-479; *Smith* v. *McCullough*, 270 U. S. 456, 463-465; *Texas and Pac. Ry. Co.* v. *Pottorff*, 291 U. S. 245, 255; *Bank of the United States* v. *Owens*, 2 Pet. 527, 538-541. *Cf. Craig* v. *Missouri*, 4 Pet. 410, 436; *Coppell* v. *Hall*, 7 Wall. 542, 556, 558.

In the present case the statute does deal with the effect of violations of the act upon contracts to sell unregistered shares (see point II, *infra*). In such a situation the court may not add a penalty of its own making (that is, to declare the entire contract void) to the penalties expressly decreed by Congress. *Fritts* v. *Palmer*, 132 U. S. 282, 289; *National Bank* v. *Matthews*, 98 U. S. 621, 627; *De Wolf* v. *Johnson*, 10 Wheat. 367, 392; *National Bank* v. *Whitney*, 103 U. S. 99, 102; *McBroom* v. *Scottish Mtg. & Land Inv. Co.*, 153 U. S. 318, 323-4; *Oates* v. *National Bank*, 100 U. S. 239, 250; *Fleckner* v. *U. S. Bank*, 8 Wheat. 338, 353, 355; *Farmers', etc., Bank* v. *Dearing*, 91 U. S. 29, 35-36; *Dunlop* v. *Mercer* (C. C. A. 8th, 1907), 156 Fed. 545; Sanborn, J., in *Hanover Nat. Bank* v. *First Nat. Bank* (C. C. A. 8th, 1901), 109 Fed. 421, 425-6; *Blodgett* v. *Lanyon Zinc Co.* (C. C. A. 8th, 1903), 120 Fed. 893, 896. *Cf. Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240, 251; *Logan County Bank* v. *Townsend*, 139 U. S. 67, 75-76.

It should be noted that this case does not present any question of the rights of a purchaser of unregistered securities to rescind his contract or recover damages under § 12. Rescission is a remedy given solely to a purchaser of stock, and obviously could not be exercised by the vendor, respondent in this case. This case involves no question of the right

of the Securities and Exchange Commission on behalf of the public to enjoin a threatened violation of the Securities Act of 1933, or affirmatively to compel registration of securities under § 20(b) and (c) of the Securities Act. This case involves no question of criminal violation of the Securities Act of 1933; it has never been suggested that any device, scheme or artifice to defraud in the sales of respondent's stock have been undertaken by petitioner.

Having in mind then that the question is solely whether the transaction here involved violates the Securities Act of 1933 and whether, if it does, the contract for the purchase of these shares by petitioner is void, we turn to the Securities Act of 1933 as the best expositor of the public policy involved.

II.

The Securities Act of 1933 Does Not Render Void a Contract for the Purchase of Securities Which Are Not Registered.

Assuming that the shares of the respondent's stock here involved ought to have been registered with the Securities and Exchange Commission (see point III, *infra*, p. 24), we consider first the provisions of the act which deal with contracts violating its terms.

Section 14 deals expressly with invalidity of contracts involving violations of the act, stating:[9]

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[9] This provision appears to be drawn from the equivalent English statute, the Companies Act of 1929, 19 and 20 Geo. 5, c. 23, § 35(2), which provides:

> "(2) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void."

And with § 5 of the Securities Act of 1933, compare § 35(3) of the English statute; and with § 12 of the Securities Act, *infra*, compare § 37(1) of the English statute.

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."

This option agreement contains no stipulation that petitioner will waive compliance with any provision of the act or the rules and regulations thereunder. Quite the contrary. The option agreement contains the express representation on the part of respondent that of its three million shares of capital stock there remain in the treasury 1,300,000 shares, "which the said party of the first part [respondent] *is authorized to sell and deliver* upon such terms as it may deem proper." (R. 175.) If in fact, registration of the stock were necessary—as respondent has contended throughout in this action—the contract was at least "instinct with an obligation" upon respondent to register the shares.[10] *Wood* v. *Lady Duff-Gordon*, 222 N. Y. 88, 91. But if respondent had not contracted to register the stock, still § 14, under the ordinary rule *expressio unius*, would indicate the contracts which do not contain a provision waiving compliance with the Securities Act are entirely valid and enforcible.

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[10] The case is, therefore, at least once removed even from that class of cases as to which Professor Williston states (Williston on Contracts, Rev. ed., § 1767, vol. 6, p. 5018):

> "In general, unless a bargain necessarily contemplates an illegal act, it is not unenforceable, and if it is later performed in a way that involves some slight violation of law, not seriously injurious to the public order, the person performing may recover on his bargain."

Or, as the same author states (*ibid.*, note 3):

> "The fact that a party bargains to do an act which will be illegal unless governmental permission is obtained does not make such bargain illegal, and if he does not obtain such permission he is responsible in damages for failure to perform."

—citing, *inter alia*, *Steele* v. *Drummond*, 275 U. S. 199. On this doctrine, respondent is liable rather than immune because of its failure to register.

Another provision of the act, § 12, provides:

"Any person who——

"(1) sells a security in violation of section 5, or

"(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof, by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a materi[illegible]fact or omits to state a material fact necessary in orde[illegible]ake the statements, in the light of the circumstances u[illegible]der which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

"shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

The right of rescission provided in § 12 is not available to the vendor (respondent); and § 12 expressly recognizes that unregistered stock may be *sold*, since it provides for liability of one "who *sells* a security in violation of section 5".

It is, therefore, apparent from the face of the statute itself that Congress had fully in mind the question as to what incidents should flow from failure to register and from dealings in unregistered stock. In certain circumstances, a purchaser may rescind. This right of recission in the events named by Congress would be wholly illusory if Congress had intended that the contract should be void at the

instance of the issuer. Congress has made express provision in § 14 as to the extent to which a contract shall be invalid—and has failed to strike down any other provisions than those which stipulate against compliance with the act. As we have shown above (p. 14), the established rule is that where Congress has stated what limited effect upon a contract non-compliance with the law shall have, the courts cannot add a judicial penalty to that adopted by the legislature by denouncing the entire agreement.

No other policy than that which Congress has thus plainly expressed can be found from an examination of the act as a whole. That act is one to enforce truth in the public sale of securities. Untruths, frauds and deceits are punished in the penal sections of the act; and remedies for losses, incurred from no affirmative fraud, but rather from failure to comply with the provisions requiring full disclosure of the truth, are established. The object is not to prohibit dealings in securities, but to afford a remedy to those damaged from failure to make full disclosure of the facts bearing on the value of securities.

The legislative history of the Securities Act of 1933 bears out what is obvious from the face of the act itself—that the policy is that issues of new securities should be accompanied by full publicity and information,[11] and, so far as available information is concerned, to place the buyer on the same plane with the management of the corporation.[12]

There are miscellaneous statements in the course of the consideration of the bill which became the Securities Act

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[11] See message of the President recommending the adoption of securities legislation, 77 Cong. Rec. 2923.

[12] Statement of Mr. Rayburn, Chairman of the Committee on Interstate and Foreign Commerce, when the bill was being considered on the floor of the House. 77 Cong. Rec. 2918.

Statement of Senator Fletcher, Chairman of the Senate Committee on Banking and Currency, to the Senate, 77 Cong. Rec. 2983.

which indicate that the bill did not in all events require the registration of securities sold to the public.[13]

We know that although there was placed before the committees a study showing that under state blue sky laws contracts to deal in unlicensed securities are very frequently held void or voidable,[14] no provision was incorporated to provide for the same result in the federal law. The scheme adopted seems rather to make those who fail to register the stock substantially insurers of the securities with respect to members of the general public who were deprived of information (see § 12, *supra*). If promoters of an issue are willing to assume this insurer's liability incurred through dealings with the public in non-registered stock, it is most difficult to find any intent on the part of Congress to prohibit such dealings.

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[13] See statement of Chairman Rayburn before the House. "This bill says to the man who issues a security, 'you may register that security; you are not compelled to register that security, but if you do not register it and you sent it through interstate commerce we will penalize you.'" 77 Cong. Rec. 2919.

The same theory was advanced by those who were instrumental in the drafting of the bill. Mr. Huston Thompson, a former member of the Federal Trade Commission who was prominent in the original or early drafting of the bill, testified before the House Committee as follows:

> "I guess there must be a misunderstanding here. The registry is not a thing which they are compelled to do. It simply provides that, in the event they do not, they suffer the penalty. It is not a thing that is absolutely required. It is not a thing that is absolutely required of them, compulsory. It is a voluntary matter. Of course, if they do not, then they subject themselves to this penalty • • • Of course, they can go ahead and sell, but if they do not register, then they subject themselves to the penalties, but we do not say that they have got to come in and register. Of course if they do not register, then they will be subjecting themselves to the penalties of the bill." Hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5480, 73d Cong., 1st Sess., pp. 61-62.

[14] Hearings, Comm. Banking and Currency of the Senate, on S. 875, 73d Cong., 1st Sess., pp. 321-322; hearings before House Committee on Interstate and Foreign Commerce, *supra*, note 13, p. 97.

Furthermore, a review of the act as a whole indicates that the duty to register was upon respondent.[15] Section 6 of the act primarily relates to registration of securities. That section provides that any security may be registered by filing a registration statement which "shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal acting officer, and the majority of its board of directors or persons performing similar functions". Only the issuer (except in the case of one who controls an issuer, which is not this case) has access to the information and has ability to secure the information required in the statement by section 7. Only the issuer can execute the statement required by section 6.

In this situation where the shares, as respondent says, ought to have been registered, and where respondent itself under the statute ought to have done the registering, and where petitioner did everything it reasonably could to induce the registration, it cannot accord with the statutory policy to permit respondent to escape its obligations by pleading its own wrong. The rule adopted by the court below encourages an issuer to withhold registration in any case where the issuer foresees a profit from abandoning an earlier agreement to sell stock. If any policy is manifested by the statute to penalize dealings in unregistered securities, it is to penalize respondent in some manner provided for

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[15] We need not consider cases in which a person in actual control of an issuer such as respondent would be called upon himself to register the issuer's shares in default of the issuer itself registering them, as perhaps is contemplated by Section 2(11) of the act. We know in this case that petitioner was not in control of respondent, for not only did petitioner do everything it could to induce respondent to register the shares, only to have respondent procrastinate and refuse to register them, but obviously petitioner's contract would not have been repudiated by respondent if petitioner had control. Nor did respondent at any time in the courts below assert as a defense to this action that petitioner itself was under a duty to register the shares. *Cf. Landay* v. *United States* (C. C. A. 6th, 1939), 108 F. (2d) 698, 704.

by the act; and that policy does not sanction a reward to respondent for its noncompliance through permitting it to escape the burdens of its bargain.

This view is made even more compelling when we consider a statute *in pari materia*, the Securities Exchange Act of 1934, c. 462, 49 Stat. 1375. That act (§ 29) [16] expressly provides that:

> "(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.
>
> "(b) Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation."

The Securities Exchange Act of 1934 contained amendments to the Securities Act of 1933 (here directly involved), c.

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[16] Section 29(b) of the Securities Exchange Act was relied upon by the court below (R. 229-230) in the mistaken notion that it was applicable to the case at bar. Although the Securities Exchange Act appended to its provisions certain amendments to the Securities Act of 1933, the provision of § 29 relates only to the different subject matter of the Securities Exchange Act itself. This ground of the decision was, accordingly, struck out upon the rehearing, although the conclusion that the court drew therefrom was allowed to stand (R. 235).

404, 48 Stat. 881, 905, Title 2. Congress thus plainly had before it the question of whether contracts should be void. It provided they should be void in the circumstances above named as to transactions within the Securities Exchange Act of 1934. Although dealing with the Securities Act of 1933 in the same Act, Congress made no similar provision with respect to the Securities Act of 1933.

Congress gave further consideration to the question of invalidity of contracts in connection with the act regulating over-the-counter brokers and dealers (by amendment to the Securities Exchange Act of 1934, *supra*). Act of June 25, 1938, c. 677, 52 Stat. 1070, 1076, § 3. The provision adopted by Congress in that act adds the following proviso to § 29 of the Securities Exchange Act of 1934:

> "*Provided,* (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 15 of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 15 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation."

Another act *in pari materia* with the Securities Act of 1933 is the Trust Indenture Act of 1939. Act of August 3, 1939, c. 411, 53 Stat. 1149, 1177, Section 327. That act provides simply, as does the Securities Act itself, that any condition, stipulation or provision to waive compliance with any provision of the act or rules or regulatons under it shall be void.

Congress has shown a consistent policy in these acts to state the circumstances in which contracts or parts of contracts shall be illegal and the consequences which shall flow from specified violations of the act. In particular, § 29 of the Securities Exchange Act of 1934, *supra*, shows that if Congress has in mind that a contract shall be void in any aspect it has in this group of statutes demonstrated its ability so to provide.

Cases under State Blue Sky Laws are not here persuasive. Those cases treating the effect of sales of unregistered or unlicensed securities in violation of a particular act are extensively dealt with in the note in 87 A.L.R. 98. (This note supersedes, 87 A.L.R. 42-43, the note in 67 A.L.R. 716, [and a number of earlier annotations] which was relied upon by the court below. R. 234.) The majority of the cases hold that a sale in violation of the particular act is outright void. In many instances this is the result of a direct statutory mandate to that effect. In other instances invalidity was thought by the court to rise from the penal provisions of the act, etc. Many of the laws,[17] however, have been amended to make sales in violation of the act voidable at the election of the purchaser. 87 A.L.R. 101. And in some jurisdictions the state courts have upheld contracts for sale of stock in violation of the act, considering that the legislature did not intend, in the particular statutes there under consideration, to make contracts void, but only to subject viola-

[17] The Uniform Sale of Securities Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1929 (9 Uniform Laws Annotated 387) contains one form of statutory provision. Section 16, dealing with "remedies" provides that "Every sale made in violation of any of the provisions of this act shall be voidable at the election of the purchaser," and that certain persons in addition shall be liable upon a rescission, in a manner provided. It is significant that in one jurisdiction, Oregon, which adopted this statute, the equivalent of Section 16 provides that a sale made in violation of the act shall be *void*. *Id.*

tions of the law to the penalties expressly prescribed by the legislature. 87 A.L.R. 103.[18] It is the last-mentioned group of cases which, we believe, most nearly approach the present case.

III.

This is Not a Transaction "Involving Any Public Offering".

The court below held that the transaction involved amounted to a public offering, so that the stock of respondent was not exempt from registration under § 4(1), clause 2, of the Securities Act. The court took the position that the option agreement itself and the so-called subsequent modifications by letter recognized that petitioner was "selling the treasury stock to all and sundry," and that this practice, as well as the case of *Securities and Exchange Commission* v. *Sunbeam Gold Mining Co.* (C. C. A. 9th, 1938), 95 F. (2d) 699, made it apparent that the offering was public.

The decision below rests upon a misapprehension. The only offer in question or before the court is the standing offer of the option agreement itself to sell shares of stock to petitioner, provided petitioner made certain payments. That was an offer to sell all the stock of the corporation remaining in its treasury to but one person, petitioner. The offer was not to the public at large, nor, in fact, to the public at all. It was in no sense a public offering.

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[18] In addition to the cases listed in the annotation, see *Fosdick* v. *Investors Syndicate*, 266 N. Y. 130, 135; *Cochran* v. *Hurth*, 29 Ohio App. 305, 163 N. E. 560, 561; *Sajor* v. *Ampolin*, 275 N. Y. 125, 131, 9 N. E. (2d) 803, 805-806; *H. H. Miller Industries Co.* v. *Roman*, 37 Ohio App. 71, 174 N. E. 141. *Cf. Robertson* v. *Business Boosters Country Club*, 212 Ala. 621, 622-623, 103 So. 576, 577; *Doherty* v. *McAuliffe* (C. C. A. 1st, 1935), 74 F. (2d) 800, 802-803, cert. den. 294 U. S. 730. This viewpoint seems to be the modern tendency.

If petitioner sold, in turn, some of the shares it received; or if respondent sold, as it was permitted to under the modification of the original agreement of May 11, 1935 (R. 212), certain of the shares to which petitioner was entitled, that is a matter quite apart from the issue raised by this action. The nature of the offerings in such instances—or, indeed, the identity of the purchasers, whether members of the public or not—was not in issue or shown by the testimony in this case. If those sales were pursuant to offerings subsequently made to the public so that the shares ought to have been registered before they were sold, that is a matter not affecting the necessity for registration so far as sales to petitioner are concerned.

We recognize that the question of whether an offering is of a public nature is very largely a question of fact. See Opinion of the General Counsel, Securities and Exchange Commission, Release No. 285, Compilation of Releases under the Securities Act of 1933, Gov. Print. Off., 1937, p. 87; Susman, *Exempted Transactions under the Securities Act of 1933*, 24 Wash. U. L. Q. 383, 386. Cf. Viscount Sumner in *Nash* v. *Lynde* [1929] A. C. 158, 169; Douglas and Bates, *Some Effects of the Securities Act upon Investment Banking* (1933), 1 U. Chic. L. Rev. 283, 299, note 61. We recognize also that a distinction is to be observed between the sale itself and the offering; there would be no escape from registration, though the sale were private, if the offering pursuant to which that sale were made were a public offering. Cf. *Black* v. *Solano Co.* (1931), 114 Cal. App. 170, 177-178, 299 P. 843. But here, it is obvious on the face of the offering that was made that it was to but one person; and that person (petitioner) took an active interest and possessed a special knowledge of the affairs of respondent—as witness the provision of the agreement (R. 177) and the modification of the agreement

of May 11, 1935 (R. 212-213) as to the use to which the proceeds received by respondent for the stock were to be put. *Securities & Exchg. Comm.* v. *Federal Compress & Whs. Co.* (W. D. Tenn., 1936), C. C. H. Securities Act Service ¶ 2203.09, app. dismissed without prejudice (C. C. A. 6th, 1937), 88 F. (2d) 1018. Cf. *Sherwell* v. *Incandescent Mantles Syndicate* (1907), 23 T. L. R. 482, 51 Sol. Jo. 446; *People* v. *Ruthven* (1936), 160 Misc. 112, 288 N. Y. Supp. 631, 636-637.

The reliance of the court below, therefore, on sales made to "others" (see Exhibit 74) seems misplaced. *Black* v. *Solano Co., supra.* So far as the offer in suit is concerned, the case comes within Rule 152 of the Securities and Exchange Commission (Release No. 305, Mar. 2, 1935, S. E. C.; C. C. H. Securities Act Service, ¶ 5152):

> "The phrase 'transactions by an issuer not involving any public offering' in Section 4(1) of the Securities Act of 1933 shall be deemed to apply to transactions not involving any public offering at the time of said transactions although subsequently thereto the issuer decides to make a public offering and/or files a registration statement."

Moreover, there is nothing in the record to support the statement of the court below that petitioner was "selling the treasury stock to all and sundry." There is no evidence that petitioner (or its president, Mr. Frost, who conducted all transactions for it) ever undertook the sale of any of the treasury stock in question, whether already received by petitioner or still in the treasury of respondent, except possibly with respect to the sale of 80,000 shares to E. J. Gibson & Co., and with respect to that sale, the shares were in respondent's treasury [19] and never were in petitioner's hands.

[19] Even as to these shares, at the trial, Mr. Nuzum, respondent's president, testified he had taken the position that petitioner "had nothing to do with getting the sale" of 80,000 shares of stock to Gibson (R. 142).

The reliance of the court below upon *Securities & Exchange Comm.* v. *Sunbeam Gold Mining Co.* (C. C. A. 9th, 1938), 95 F. (2d) 699, is likewise a misapprehension. That case concerned an offering to 530 individuals, including all the stockholders of two companies which were to be merged. In the present case, we have an offer to but one person, petitioner; and there is not the remotest reason to suspect that that offer was consequent upon any offering to the public or was merely a part of such a public offering.

On the contrary, the fact that petitioner undertook to purchase the entire 1,300,000 shares which remained in the treasury of respondent (R. 175) put it beyond the power of respondent to offer any shares to the public while the agreement remained unchanged. It is true that because petitioner later became involved in financial difficulties it subsequently waived its right to take certain of the treasury shares so that they might be sold; but there is nothing to show how this converted the transaction into a "public offering." The rule is that "It is not to be presumed the parties intended to make a contract which the law does not allow." *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174, 181. "A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts." *Cincinnati, P., B. S. & P. P. Co.* v. *Bay*, 200 U. S. 179, 184; see *Hobbs* v. *McLean*, 117 U. S. 567, 575-6.

Also, Mr. Frost himself had noted, February, 1935, Ex. 67, that Mr. Nuzum had "talked with Mr. Lilly of Gibson & Company" respecting calls for more stock of respondent. The sale to Gibson & Company was in May, 1935 (Exs. 32, 74; R. 74). On the other hand, Mr. Frost testified, in showing that the monthly payments on the contract had been met in part from proceeds of treasury stock sold other persons, that "* * * prior to the date of the next payment I made that sale to Gibson" (R. 74). He later testified (R. 86) that he himself sold the 80,000 shares [to Gibson] and that the sale of 20,000 shares to J. E. Jones was with his consent.

Accordingly, the situation is one in which a private, not public, offering was made to petitioner; and the registration of the shares was unnecessary under the Securities Act. Even, therefore, if contracts are invalid by which the parties seek to deal in shares which ought to be registered under that act, but which are not, that rule would have no effect here; for the shares are exempted by Sec. 4(1) of the act.

Conclusion.

The judgment of the Supreme Court of Idaho should be reversed.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

Provisions of Securities Act of 1933, c. 38, 48 Stat. 74, as amended by the Securities Exchange Act of 1934, c. 404, 48 Stat. 881, 905, Title II.

Sec. 2. [15 U. S. C. § 77b] When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * * * *

(3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. * * *

* * * * * * *

(4) The term "issuer" means every person who issues or proposes to issue any security; * * *

* * * * * * *

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation

in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

* * * * * * *

Sec. 4. [15 U. S. C. §77d] The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; * * *

* * * * * * * *

Sec. 5 [15 U. S. C. § 77e]. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate com-

merce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.

* * * * * * *

Sec. 6. [15 U. S. C. § 77f] (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States;

* * * * * * *

Sec. 12. [15 U. S. C. § 771] Any person who—

(1) sells a security in violation of section 5 or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made,

not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

* * * * * * *

Sec. 14. [15 U. S. C. §77n] Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

* * * * * * *

Sec. 17. [15 U. S. C. §77q] (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, adver-tise-

ment, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

* * * * * * *

Sec. 20 [15 U. S. C. §77t] * * * (b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. * * *

* * * * * * *

Sec. 24. [15 U. S. C. §77x] Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Specification of Errors to be Urged.

1. The court erred in holding that the contract of September 10, 1934, as modified, violates the Securities Act of 1933.

2. The court erred in holding that the contract of September 10, 1934, as modified, is void.

3. The court erred in holding that the contract of sale and purchase of the shares of stock involved is not exempt from the provisions of Section 5 of the Securities Act of 1933 by reason of Section 4 of said Act.

4. The court erred in failing and refusing to enter judgment for petitioner.

5. The Court erred in entering judgment for respondent.

6. The court erred in finding and holding that petitioner sanctioned the sale of treasury stock to all and sundry.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 1010

A. C. FROST & COMPANY,
Petitioner,

vs.

COEUR D'ALENE MINES CORPORATION
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

JAMES A. WAYNE,
Wallace, Idaho;
W. H. LANGROISE,
Boise, Idaho.
Counsel for Respondent.

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OPINIONS OF COURTS BELOW

No written opinion was rendered by the trial court, but findings of fact and conclusions of law were adopted. (R. 205-218.) Judgment was rendered July 6, 1938. (R. 218-219.)

The Supreme Court of the State of Idaho filed its final opinion on February 15, 1940 (R. 227-235), which appears in 98 Pac. (2) 965. It has not yet been officially reported.

JURISDICTION

The petitioner attempts to found the jurisdiction of this court, under the provisions of Section 237 (b) of the Judicial Code as amended, upon two points which, it claims, raise a substantial Federal question.

1. Was the option agreement as modified a violation of the provisions of the Securities Act of 1933?

2. Assuming that the first question is answered in the affirmative, is the contract as modified invalid and unenforceable by either party in the courts of the State of Idaho?

STATEMENT OF THE CASE

This action was commenced by petitioner in an Idaho state court to recover from respondent for breach of contract. This contract was entered into between respondent and petitioner (in the name of W. J. Boland, petitioner's agent, and assigned to petitioner by Boland on the same day, Finding 4, R. 210, 211, 179) on September 10, 1934, and consisted of an option to petitioner to purchase 1,300,000 shares of treasury stock of respondent, being almost all the stock of respondent in its treasury, for 10c a share. Petitioner was required to make specified monthly payments, at which time stock was issued to it to the amount of the payment. This contract is attached to the complaint as Exhibit A. (R. 175-178.)

Subsequently, on April 26, 1935, this contract was modified to reduce and alter the monthly payments which petitioner was required to make. (Finding 5, R. 211.)

This contract was again modified on May 15, 1935 (Finding 6, R. 212), and the terms of this modification are set forth in plaintiff's Exhibit 14. This modification provided for a general sale of the stock, with 10c of the purchase price of each share being credited to petitioner on the option agreement, and the balance of the purchase price was to be placed in respondent's treasury to be used for the designated purposes. This money so placed in respondent's treasury was to be repaid to petitioner out of the earnings of respondent.

This option contract as modified forms the basis of this action.

The stock of respondent was not registered with the SEC, under the provisions of the Securities Act of 1933, or any amendment thereof, (Finding 10, R. 215), a fact that was well

known to both petitioner and respondent from the inception of the contract.

Petitioner received and paid for 165,000 shares of stock under this contract as modified. Petitioner and R. W. Nuzum, an officer of respondent, together sold and disposed of 279,850 shares of stock to others, including large blocks sold to and through brokerage houses. (Plaintiff's Ex. 74, R. 95, defendant's Ex. 94, R. 136; R. 95, 109, 30, 33-37 inc., 67, 68, 69, 74, 76, 86, 115, 116, 122.) From the purchase money received from these sales made by petitioner and Nuzum, 10c a share was turned in to the treasury of respondent and petitioner received a credit for such amounts on its option payments. (R. 27, 28, 31, 33-37 inc.) Part of the balance of the purchase price was paid directly to petitioner. Nuzum received a 25 per cent commission on part, and $16,306.00 was turned over to respondent and credited to a contingency account of petitioner, to be paid to petitioner out of earnings. (R. 27, 28, 31, 33-37 inc., plaintiff's Ex. 74, R. 95.) Sufficient monies were paid by petitioner to respondent and credited to petitioner from the proceeds of sales to others to meet payments under the option agreement as modified, up to and including the payment due October 10, 1935. (Finding 8, R. 213, 214.)

Petitioner abandoned all its rights under the contract as modified in the summer of 1935, and failed thereafter to make any further purchase of stock because of its inability to arrange the financing. (Finding 9, R. 214.) On March 13, 1936, plaintiff notified petitioner of the forfeiture of the contract. (Finding 11, R. 215.)

The trial court denied petitioner any relief on its first cause of action, which was based on the unexecuted portion of the contract, and allowed petitioner to recover on its second cause of action in the sum of $16,306.00, being the amount received by respondent from the purchase price of stock sold by petitioner and Nuzum, over and above 10c a share, and credited by respondent to petitioner in the contingency account.

Both respondent and petitioner appealed.

The State Supreme Court sustained the trial court on the

first cause of action, but reversed it on the second, and denied petitioner any relief whatsoever.

SUMMARY OF ARGUMENT

A, The petition asserts that there was no violation of the Securities Act of 1933 because it comes within the exemptions of that Act. This was decided against petitioner by the state courts as a question of fact, so no Federal question is presented.

(1) The facts disclose that there was a public offering of the stock, so there is no exemption under Sec. 4 of the Act.

(2) Petitioner can claim no exemption from the operation of the Act on the grounds that it is not an issuer, underwriter or dealer.

B. As the contract as modified was made in violation of the Securities Act of 1933, the decision of the state court that it will not recognize or enforce it is a matter of local common law of the state, and raises no Federal question.

(1) This court will not review questions of local common law.

(2) This court will only consider the final opinion filed by the state Supreme Court.

(3) Both petitioner and respondent are in pari delicto.

(4) The questions presented are not of general importance, involving merely the parties, and factual considerations.

ARGUMENT

(Point A)

The petition asserts that there was no violation of the Securities Act of 1933 because it comes within the exceptions of that Act. This was decided against petitioner by the state courts as a question of fact, so no Federal question is presented.

The Supreme Court of Idaho held (98 P. (2) 965) that this contract as modified was a violation of Sec. 5 of the Securities

Act of 1933 (c. 38, Title I, Sec. 5, 48 Stat. 77, 15 U. S. C. A. 77e), and based this conclusion upon the evidence presented in this cause. Consequently, no substantial Federal question is raised, because the construction of the Federal Statute is not involved; it is merely the application of the Statute to the facts in the instant case. This court does not review the finding of facts made in the state court.

Grayson v. Harris, 267 U. S. 352, 69 L. ed. 652 (1924);
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417 (1908);
King v. West Virginia, 216 U. S. 92, 54 L. ed. 396 (1909).

Petitioner asserts that there is no violation of the Act because of two exemptions contained in Section 4 of the Securities Act of 1933 (15 U. S. C. A. 77d).

A. That the Act does not apply to transactions by an issuer not involving a public offering; and

B. That the Act does not apply to transactions by any person other than an issuer, underwriter, or dealer.

(1) The facts disclose that there was a public offering of the stock, so there is no exemption under Sec. 4 of the Securities Act of 1933.

It is conceded that the stock involved in this case is a "security" as defined by c. 38, Title I, Sec. 2 (1), 48 Stat. 74, 15 U. S. C. A. 77b, and also that the securities were sent through the mail and were transferred in interstate commerce. It is further conceded that these securities were not registered with the Securities & Exchange Commission.

Consequently, petitioner is claiming relief from the operation of the Act under an exemption, and thus the burden is on petitioner to prove that it comes within the exemption, and, further, the terms of an exception are strictly construed against a claimant of its benefit.

Spokane & I. E. R. Co. v. United States, 241 U. S. 344, 60 L. ed. 1037 (1915);

Securities & Exchange Commission v. Sunbeam Gold Mines Co., 95 Fed. (2) 699 (1938).

The facts in this case conclusively substantiate the decision of the state court that the contract as modified was not excepted from the Securities Act of 1933 as not involving a public offering. The state court said (98 P. (2) 965, at 967):

> "The proof rather than sustaining the burden of showing that the transaction was exempted affirmatively shows that all the stock offered for sale amounted to public offerings and that interstate means of communication and transportation were used in connection therewith. Certainly the facts disclosed by the option agreement itself and the so-called subsequent modifications by letters, etc., and the many letters passing between Frost & Company and Coeur d'Alene Mines Company, recognizing that Frost & Company was selling the treasury stock to all and sundry, directing delivery of such treasury stock to other stock firms or brokers for sale to or by them flatly refutes such contention as does likewise the case of Securities & Exchange Commission v. Sunbeam Gold Mining Co., 9 Cir., 95 F. (2) 699."

The state trial court of necessity held that there was a public offering because it found that the contract violated the Securities Act of 1933. (Finding 10, R. 215; Conclusion 4, R. 218.)

These conclusions are amply supported by the evidence.

Petitioner in its complaint alleges modification of the original contract by the letter sent by petitioner to respondent, dated May 11, 1935 (plaintiff's Ex. 14, R. 20); the trial court found that this letter and acceptance thereof effected an alteration (Finding 6, R. 212). This modification provides for a general sale of the stock and specifies how the proceeds of the sales are to be applied. It is undisputed that of all the stock sold under the contract as modified, petitioner received and paid for 165,000 shares, and 279,850 shares were sold and delivered to many other persons. (Plaintiff's Ex. 74, R. 95, and defendant's Ex. 94, R. 136.)

This sale and distribution of the stock to others was carried on pursuant to the contract as modified, and was effected by petitioner and R. W. Nuzum, an officer of respondent corporation.

Plaintiff's Exhibits 25 (R. 28), 26 (R. 29), and 27 (R. 30) disclose a sale of 20,000 shares to or by Starmount as early as the end of January, 1935.

In a letter dated February 1, 1935, written by A. C. Frost, President of petitioner (plaintiff's Ex. 33, R. 42), petitioner shows its desire to have the stock listed on an exchange, "but whichever offers the best advantage for trading purposes". This refutes petitioner's contention that it was purchasing the stock for an investment.

Defendant's Ex. 67 (R. 90) contemplates a sale of stock to Gibson & Co., and a sale of 80,000 shares to this concern was made on May 8, 1935 (R. 30, 69, 76, 115, 122). The President of petitioner actually consummated this sale himself (R. 30, 74, 86).

Plaintiff's Ex. 37 (R. 44), a letter from A. C. Frost to R. W. Nuzum, shows that petitioner was anxious for a general sale of the stock, and that it was not buying the stock for investment purposes. (It should be kept in mind that almost all the treasury stock of respondent was covered by the option. (Finding 3, R. 209; R. 110)).

On April 23, 1935, petitioner gave respondent permission to deal with the treasury stock as it saw fit (defendant's Ex. 50, R. 65). However, petitioner always asserted thereafter that it was entitled to the proceeds of the sales of stock (R. 142). And, in fact, from the money received from stock sold generally to the public thereafter, 10c per share was applied on the option payments and the balance of the purchase price either paid to petitioner or applied as directed by the modification of May 11, 1935 (plaintiff's Ex. 14, R. 20).

On May 6, 1935, Frost wrote a letter to Nuzum approving the sale of 10,000 shares of stock. (Defendant's Ex. 66, R. 82.)

In a letter dated May 11, 1935 (defendant's Ex. 55, R. 76), petitioner agrees to give Nuzum a commission on future sales

of stock, and also on sales already made, in accord with a proposition made by petitioner "some months ago".

Plaintiff's Ex. 28 (R. 33) discloses the agreement to sell 20,000 shares to the J. E. Jones Brokerage Corporation. This sale was agreed to by petitioner (R. 33-37, 69, 86, 116). Ten cents a share from the purchase price received from this sale was turned over to respondent and applied on the option payments. The balance of the purchase price was given to petitioner, who paid Nuzum a 25 per cent commission (R. 33-37).

Defendant's Ex. 63 (R. 82) shows that it was contemplated to sell a large block of this stock before it was listed with the Securities & Exchange Commission.

On July 8, 1935, Frost sent to Nuzum a certificate of this stock for 5000 shares, and requested Nuzum to sell it. Also, he stated that he wished to sell 25,000 or 30,000 shares during that week (defendant's Ex. 70, R. 91).

The principal method used by petitioner in meeting the payments required under the option contract as modified was by a general sale of the stock held under the option, and crediting 10c per share out of the purchase price of the stock sold on the payments (R. 27-28).

That petitioner was making and attempting to make sales of this stock appears from the testimony of petitioner's President, who stated that after June 29, 1935, petitioner ceased making further sales (R. 50-51).

Plaintiff's Ex. 74 (R. 95) shows the amount of this stock which was sold generally to the public by petitioner and Nuzum (R. 95, 109).

In addition to these numerous sales of this treasury stock, petitioner was also during this time making sales to the public of stock of respondent which was owned by it, and also a large amount owned by the Bunker Hill Mines Corporation. (R. 67-68.)

Many of the transactions and correspondence hereinbefore referred to were carried on by A. C. Frost, petitioner's President, but they were all for and on the behalf of petitioner itself. (R. 52.)

Thus, it appears affirmatively from the evidence that the contract as modified, itself, provided for a general sale of the stock to the public, and for the distribution of the proceeds of such sales; both parties contemplated throughout that sales to the public would be offered and made from time to time; and, in fact, 279,850 shares were sold and part of the purchase price received from every sale was credited to petitioner on the option payments, and the balance either paid to petitioner directly or paid as commissions, or turned over to respondent under the agreement, and credited to petitioner in the contingency account.

Consequently, not only has petitioner failed to maintain the burden of establishing that it was exempt from the operation of the Securities Act of 1933, because there was no public offering of the stock, but it conclusively appears from the evidence that the contract as modified is in violation of the Act — as was found by both the state trial court and the Supreme Court of Idaho.

The only question involved is an application of the law to the facts of the instant case. Both state courts found from substantial evidence that there was a violation of the Act. Therefore, no substantial Federal question is presented to this court.

(2) Petitioner can claim no exemption from the operation of the Securities Act of 1933 on the grounds that it is not an issuer, underwriter or dealer.

Petitioner also asserts that as it is not an issuer, underwriter or dealer, it is exempt from the operation of the Securities Act of 1933 under the provisions of Section 4 (1) of the Act. (c. 38, Title I, Sec. 4, 48 Stat. 77.) Again, as petitioner is claiming an exemption, the burden is upon it to establish it.

Spokane & I. E. R. Co. v. United States, supra;
Securities & Exchange Commission v. Sunbeam Gold Mines Co., supra.

This exemption applies to transactions by any person not an issuer, underwriter or dealer. There is no question but that respondent is an issuer as defined by Sec. 2 (4) of the Act. So it is a transaction involving an issuer, and the exemption does not apply. It could hardly be asserted that both parties to any transaction must be either an issuer, underwriter or dealer for the Act to apply, for, if such were the case, any issuer, underwriter or dealer could make general public sales of unregistered securities through the mails and in interstate commerce without violating the Act so long as no sales were made to another issuer, underwriter or dealer. Such a construction would render the Act almost completely ineffective. Consequently, it is immaterial whether petitioner is an issuer, underwriter, or dealer, or not. In the case of Securities & Exchange Commission v. Sunbeam Gold Mines Co., supra, it did not appear that any of the persons to whom the defendant offered to sell its stock were issuers, underwriters or dealers; nevertheless, it was there held that the sale was a violation of the Act.

Furthermore, the facts above set forth show that petitioner is either an underwriter or a dealer, as defined by Sec. 2 (11) and (12) of the Act. (15 U. S. C. A. 77b.)

Sec. 2 (11) is as follows:

> "The term 'underwriter' means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

There can be no doubt under the evidence as set forth above that petitioner was purchasing the stock under the contract as modified with a view to the general distribution of the securities, and that petitioner had a direct participation in the undertaking which effected a distribution and sale to many persons of 279,850 shares of this stock, in addition to that actually issued to petitioner. Therefore, petitioner is an underwriter under this definition.

Sec. 2 (12) is as follows:

> "The term 'dealer' means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person."

As pointed out above, a general public sale of this stock was provided for by, and actually carried out under, the option contract as modified. Therefore, petitioner was engaged in the business of offering, buying, selling, dealing, and trading in the stock of defendant, and is a dealer under this definition.

(Point B)

As the contract as modified was made in violation of the Securities Act of 1933, the decision of the state court that it will not recognize or enforce it is a matter of local common law of the state and raises no Federal question.

(1) This court will not review questions of local common law.

The petitioner urges that, conceding that the contract as modified is in violation of the Securities Act of 1933, the refusal of the state court to enforce it deprives it of a right, title, privilege or immunity under a Federal Statute.

Respondent submits that the decision of the Supreme Court of the State of Idaho holding that it would not recognize or enforce the contract is a declaration of the local common law of the State of Idaho, and, consequently, no Federal question is presented.

In its opinion the Idaho court did not base its decision upon any provision of the Securities Act of 1933, or any other Federal Statute. It found that the contract as modified violated the Act and that the parties were in pari delicto. Then it was decided that the contract was unenforceable because, under the established common law of the State, a contract made in violation of a Statute, or against public policy, will not be recognized by the court.

Petitioner in its brief (p. 9) contends that the State Supreme Court, in holding that it will not permit recovery under such a contract, is exercising legislative power and adding a section to the Securities Act of 1933. This conception is erroneous. The court holds that if a contract is made in violation of law, and where by statute such violation is made a criminal offense (c. 38, Title I, Sec. 24, 48 Stat. 87, 15 U. S. C. A. 77x), the court will not recognize or enforce such a contract. This is not the enactment of a statute, by the court, but a proper exercise of judicial power. The cases cited in the court's opinion show that this is the well established rule in Idaho.

McFall v. Arkoosh, 37 Ida. 243, 215 Pac. 978 (1923);
Deer Creek H. Dist. v. Doumecq H. Dist., 37 Ida. 601, 218 Pac. 371 (1923);
Libby v. Pelham, 30 Ida. 614, 166 Pac. 575 (1917);
Cf. McConnon v. Holden, 35 Ida. 75, 204 Pac. 656 (1922).

This is also the general rule elsewhere.

Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272 (1889);
Weil v. Neary, 278 U. S. 160, 73 L. ed. 243 (1928);
Lingle v. Snyder, 160 Fed. 627 (1908);
Brandenburg v. Miley Petroleum Exploration Co., 16 Fed. (2) 933 (1926);
McManus v. Fulton, 85 Mont. 170, 278 Pac. 126, 67 A. L. R. 690 (1929);

Asher v. Johnson, 26 Cal. App. (2) 403, 79 Pac. (2) 457 (1938);
Crawford v. McConnell, 173 Okla. 520, 49 Pac. (2) 551 (1935);
Delgado v. Delgado, 42 N. Mex. 582, 82 Pac. (2) 909 (1938);
Holm v. Bramwell, 20 Cal. App. (2) 332, 67 Pac. (2) 114 (1937);
See also cases cited in the court's opinion, 98 Pac. (2) 965, 969.

It is well settled that this court will not review questions of local common law.

American Railway Express Company v. Kentucky, 273 U. S. 269, 71 L. ed. 639 (1926);
Kryger v. Wilson, 242 U. S. 171, 61 L. ed. 229 (1916);
Fox Film Corp. v. Muller, 296 U. S. 207, 80 L. ed. 158 (1935).

(2) This court will only consider the final opinion filed by the State Supreme Court.

Petitioner in the petition and brief (p. 8) attempts to raise a Federal question from the opinion of the state court before it was modified after the petition for rehearing was filed. But this court will only recognize the final opinion of the State Supreme Court, and will not consider any temporary opinion which is modified or changed before it is filed in its final form.

Grayson v. Harris, supra.

This court will not disregard the explicit holding of the state court as to the basis of its decision.

Guaranty Trust Co. v. Blodgett, 287 U. S. 509, 77 L. ed. 463 (1932).

(3) Both petitioner and respondent are in pari delicto.

There can be no question but that both the parties to the contract were in pari delicto. The mass of correspondence

introduced as exhibits and the testimony of Frost, petitioner's President, shows that petitioner realized from the inception that these securities were subject to registration under the Securities Act of 1933, and that they were not registered.

On April 4, 1935, petitioner's President wrote a letter to Nuzum, proposing that in making the application to list the securities certain information should be withheld. (Defendant's Ex. 48, R. 61; See R. 61-62.) In addition, Frost testified that he wrote the letter permitting respondent to deal with the stock as it saw fit (defendant's Ex. 50, R. 65) to be used in getting the stock registered with the Securities & Exchange Commission, but that he didn't consider it binding on petitioner (R. 87-88).

(4) The questions presented are not of general importance, involving merely the parties, and factual considerations.

Petitioner asserts that this case involves questions of public importance. But the contrary seems apparent. No new questions of law of universal application are presented; it is concerned merely with a particular factual situation calling for conclusions of ultimate fact thereon and the application of law to those facts. A variation in the facts might result in different conclusions. The state court has found that under these particular facts petitioner is not exempt from the operation of the Securities Act of 1933, and then applies the Idaho common law rule that it will not recognize a contract made in violation of law. This case is of interest solely to the parties involved.

CONCLUSION

Both state courts decided that from the evidence the contract as modified violates the Securities Act of 1933. This is amply supported and presents merely a factual situation which will not be reviewed by this court. Under the well established common law of Idaho the state court refused to enforce an illegal contract made in violation of law. So no Federal question is presented. It is respectfully submitted

that the petition for a writ of certiorari should be in all respects denied, with costs.

Respectfully submitted,

JAMES A. WAYNE,
Wallace, Idaho;
W. H. LANGROISE,
Boise, Idaho,
Counsel for Respondent.

APPENDIX

Pertinent provisions of the Securities Act of 1933, c. 38, Title I, 48 Stat. 74, 77, 87 (15 U. S. C. A. 77a et seq.):

Sec. 2 (15 U. S. C. A. 77b):

"When used in this subchapter, unless the context otherwise requires—

(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

* * *

"(4) The term 'issuer' means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted-management, or unit type, the term 'issuer' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term

'issuer' means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term 'issuer' means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering."

Sec. 4 (15 U. S. C. A. 77d):

"The provisions of section 77e (Sec. 5) shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 77h is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter."

Sec. 5 (U. S. C. A. 77e):

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of trans-

portation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this subchapter, unless such prospectus meets the requirements of section 77j; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 77j."

Sec. 24 (15 U. S. C. A. 77x):

"Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 78

A. C. FROST & COMPANY,
Petitioner,

vs.

COEUR D'ALENE MINES CORPORATION,
Respondent.

BRIEF FOR RESPONDENT

JAMES A. WAYNE,
Wallace, Idaho;
W. H. LANGROISE,
Boise, Idaho,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 78

A. C. FROST & COMPANY,

Petitioner,

vs.

COEUR D'ALENE MINES CORPORATION,

Respondent.

BRIEF FOR RESPONDENT

OPINIONS OF COURTS BELOW

No written opinion was rendered by the trial court, but it adopted findings of fact and conclusions of law. (R. 205-218.) Judgment was rendered July 6, 1938. (R. 218-219.)

The Supreme Court of the State of Idaho filed its final opinion on February 15, 1940 (R. 227-235), which appears in 98 Pac. (2) 965. It has not yet been officially reported.

JURISDICTION

The opinion of the Supreme Court of the State of Idaho held that a contract whereby respondent, the issuing corporation, gave petitioner an option to purchase its stock,

and providing for the sale of such stock to the general public and for the distribution of the proceeds of such sales to them, under which offerings and sales of said stock were in fact made to the public generally, is clearly in violation of the Securities Act of 1933 (Act of May 27, 1933, c. 38, Title 1, 48 Stat. 74, 15 U.S.C.A. 77a et seq.), because the stock was not registered as required thereby; further, the court held that as the contract violated this Federal Statute, it is invalid and unenforceable.

It is the contention of petitioner that jurisdiction is conferred upon this court by the provisions of Sec. 237 (b) of the Judicial Code, as amended.

This court granted a writ of certiorari, October 14, 1940.

STATEMENT OF THE CASE

Petitioner commenced this action in the Idaho State Court to recover damages from respondent for breach of contract. On September 10, 1934, respondent and W. J. Boland entered into a contract which provided that Boland should have the option to purchase from respondent 1,300,000 shares of respondent's stock then in its treasury for 10c a share. Specified monthly payments were required to be made by Boland and stock would be issued to him or his nominee as paid for. A copy of this contract referred to as the "option agreement" is attached to petitioner's complaint and marked Exhibit A (R. 175-178).

It subsequently appeared that Boland was acting as agent for petitioner in obtaining the option agreement, and by instrument dated September 8, 1934, two days before the option agreement, Boland assigned it to petitioner (Plaintiff's Exhibit 8, R. 15).

On April 26, 1935, the option agreement was modified to reduce and alter the required monthly payments which petitioner was required to make. (Finding 5, R. 211.)

On May 15, 1935, this option agreement was again modified as set forth in plaintiff's Exhibit 14 (R. 20). This modification provided for general sales of this treasury stock, and prescribed that ten cents a share out of the purchase price received from such sales was to be credited to petitioner and applied on the payments required under the option agreement. The balance of such purchase price, instead of being paid over to petitioner as formerly, was to be placed in respondent's treasury to be used for the purposes designated in the modification. This money so placed in respondent's treasury was to be paid to petitioner out of the earnings of respondent.

This option contract as modified by these subsequent agreements is the contract upon which petitioner bases its causes of action. (R. 171-172.)

This stock of respondent with which this contract was concerned was not registered with the Securities & Exchange Commission, as required by the provisions of the Securities Act of 1933, or any amendment thereof. (Finding 10, R. 215.) The frequent communications between petitioner and R. W. Nuzum, introduced as Exhibits in this action, show conclusively that petitioner and respondent both realized from the beginning that this stock was not registered under the Securities Act of 1933, and, further, that this Act required such registration in order to make the option agreement and their transactions thereunder lawful.

Petitioner, itself, paid for at ten cents a share, and received under this contract, 165,000 shares of stock. Petitioner and said R. W. Nuzum together sold and disposed of 279,850 shares of this optioned stock to divers other persons, including large blocks of stock sold to and through brokerage houses. (Plaintiff's Ex. 74, R. 95, Defendant's Ex. 94, R. 136; R. 95, 109, 30, 33-37 inc., 67, 68, 69, 74, 76, 86, 115, 116, 122.) These sales were made during the period from

January 31 to August 15, 1935, inclusive. (Plaintiff's Ex. 74, R. 95.) Out of the purchase money received, ten cents a share was placed in the treasury of respondent and credited to petitioner on its option payments. The proceeds over and above this ten cents per share received from these numerous sales to others amounted to $29,306.00. Of this sum, $13,000.00 was paid to petitioner, part of which was paid by petitioner to R. W. Nuzum as a commission, and the balance of $16,306.00 was turned over to respondent and credited to petitioner, to be paid to it out of earnings of respondent, as provided by the modification of May 15, 1935. (Plaintiff's Ex. 74, R. 95.)

During the months of May, June and July, 1935, in addition to the sales above mentioned, petitioner sold 15,000 shares of respondent's stock which it had previously acquired (R. 67), and 140,000 shares which belonged to the Bunker Hill Mine Corporation of Toronto, (R. 67-68), and on which petitioner also had an option to purchase.

During this time the only assets of the respondent corporation were an option to purchase the Mineral Point group of mining claims, on which no payments had been made, and an option to purchase the Lonesome Pine group, on which a small amount had been paid. (R. 54, 66.)

Petitioner paid to respondent under the contract sufficient money and received credit from sales made to others to meet the payments under the option agreement as modified up to and including the payment due October 10, 1935. (Finding 8, R. 213, 214.)

The trial court found (Finding 9, R. 214) that petitioner abandoned all its rights under the contract as modified in the summer of 1935, and thereafter failed to make any of the required payments because of its inability to finance the purchase of the stock; further, that petitioner's failure to perform the contract was not because it was prevented from

so doing by respondent. (Finding 11, R. 215.) On March 13, 1936, respondent notified petitioner of termination of the option agreement. (Finding 11, R. 215.)

Petitioner's first cause of action seeks as damages its anticipated profits from the portion of the contract as modified, which is completely executory on both sides. The trial court denied petitioner any relief on this cause of action. Petitioner's second cause of action is to recover the sum of $16,306.00, which was received by respondent from the sales of the optioned stock to others by petitioner and Nuzum, over and above the ten cents a share, and which was credited to petitioner to be paid out of the earnings of respondent. There is no contention by petitioner that respondent had any earnings out of which this sum could be paid. The trial court allowed recovery on this second cause of action.

Both petitioner and respondent appealed to the Supreme Court of Idaho.

The State Supreme Court held that the option agreement as modified was made in violation of the Securities Act of 1933, and, therefore, was invalid and unenforceable. It sustained the decision of the trial court on the first cause of action, and overruled it on the second, denying petitioner any relief whatsoever. (R. 227-235 inc.)

SUMMARY OF ARGUMENT

The Supreme Court of the State of Idaho held that the contract entered into between respondent and Boland, and by him assigned to petitioner, violated the Securities Act of 1933, and was, therefore, void and unenforceable, and that the parties would be left in the position in which the court found them.

Petitioner, in this appeal, objects to this decision on two grounds:

First, that this is not a transaction involving a public

offering, and is consequently exempt from the provisions of the Act under Sec. 4 (1).

Second, that even though this contract is in violation of the Securities Act, the Idaho Court should not have refused to enforce it.

These two questions will hereafter be discussed in that order.

It is conceded in this action that the stock involved is a "security" as defined by the Securities Act, Sec. 2 (1); that these securities were sent through the mail and transferred in interstate commerce, and that the contract itself, the assignment, and all modifications of the contract, were entered into through use of the mails and interstate commerce (R. 53); and that these securities were not registered with the Securities & Exchange Commission. Further, that respondent is an issuer as defined by Sec. 2 (4) of the Act.

It appears from the evidence that, so far as petitioner is concerned, most of the transactions and correspondence were carried on by A. C. Frost, petitioner's President, but they were all for and on behalf of petitioner itself. (R. 52.)

Petitioner in its brief (p. 9) refers to the opinion of the Supreme Court of Idaho before it was modified after the petition for rehearing was filed. But this Court will only consider the final opinion of the State Supreme Court, and will not consider any temporary or intermediate opinion before it is filed in its final form. Grayson v. Harris, 267 U.S. 352, 69 L. ed. 652 (1924).

This court will not disregard the explicit holding of the State Court as to the basis of its decision. Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 77 L. ed. 463 (1932).

ARGUMENT

I

As this transaction involves a public offering there is no

exemption from the operation of the Securities Act of 1933.

Petitioner asserts that this option agreement as modified is exempt from the requirements of the Securities Act of 1933, because it is not a transaction "involving any public offering", as provided in Sec. 4 (1) of the Act, and, therefore, it was not necessary for the stock of respondent to be registered as required by the Act.

The State trial court held that this contract (where this "agreement" or "contract" is mentioned herein, it refers to the original option agreement as modified, which forms the sole basis for petitioner's action), was entered into in violation of the provisions of the Act, and refused to accept the contention of petitioner that no public offering was involved. (Finding 10, R. 215.)

The Supreme Court of Idaho carefully considered the record and exhibits in this case, and ruled that the Securities Act was violated by the parties by entering into this agreement and by their operations under it, and that it clearly appeared that no exemption could be claimed on the ground there was no public offering. (98 Pac. (2) 965.) The court said at page 967:

> "The proof rather than sustaining the burden of showing that the transaction was exempted affirmatively shows that all the stock offered for sale amounted to public offerings and that interstate means of communication and transportation were used in connection therewith. Certainly the facts disclosed by the option agreement itself and the so-called subsequent modification by letters, etc., and the many letters passing between Frost & Company and Coeur d'Alene Mines Company, recognizing that Frost & Company was selling the treasury stock to all and sundry, directing delivery of such treasury stock to other stock firms or brokers for sale to or by them flatly refutes such contention as does likewise the case of Securities & Exchange Commission v. Sunbeam Gold Mining Co., 9 Cir., 95 F. (2) 699."

No claim is made by petitioner that the Securities Act does not apply to this transaction and require the registration of the stock, except the one ground that it is exempt by the provisions of Sec. 4 (1) of the Act. As petitioner is claiming relief from the operation of the Act under an exemption, the burden is on petitioner to prove that the transaction comes within the terms of the exemption; furthermore, the terms of an exception are strictly construed against a claimant of its benefit.

Spokane & I. E. R. Co. vs. United States, 241 U.S. 344, 60 L. ed. 1037 (1915);

Securities & Exchange Commission v. Sunbeam Gold Mines Co., 95 Fed. (2) 699 (1938).

As was held by both the State courts, not only does the evidence disclose that petitioner has failed to maintain its burden of showing that there was no public offering, but rather it conclusively appears that the transaction involved a public offering of these securities.

The original option was modified by agreement of the parties, and the terms of this modification are set forth in plaintiff's Ex. 14. It is this altered contract which forms the basis for both of petitioner's causes of action. This contract not only provides that petitioner has an option to purchase the treasury stock of respondent at ten cents a share, but also that there shall be a general sale of this stock so optioned; that ten cents a share of the purchase price received from such sales shall be credited to petitioner on its option payments; that the balance of the proceeds shall be turned over to respondent for specified purposes, and that the amount of these sums shall be paid to petitioner out of the earnings of respondent.

The agreement of September 10, 1934, specifically provided that the stock should be issued to Boland *or his*

nominee (plaintiff's Ex. 9, R. 14), thus showing that sales of the stock by Boland was contemplated. Consequently, by the very terms of the agreement itself it was provided for general sales of the stock by the parties. That this conclusion is correct unavoidably appears from an examination of the acts of the parties under and pursuant to the contract.

As early as the end of January, 1935, 20,000 shares of stock were sold to or by Starmount. (Plaintiff's Ex. 25, R. 28; Plaintiff's Ex. 26, R. 29; Plaintiff's Ex. 27, R. 30.)

By the first of February, 1935, petitioner realized that it was necessary to comply with the Securities Act, and thereafter frequently urged compliance therewith. (Exs. 33, 34, 35, 36, 37, 38, 39, 40, 68, 41, 48, 17, 42.) This conclusion was reached after taking the matter up with an attorney (plaintiff's Ex. 37, 40). So it appears that there was never any doubt in the mind of petitioner but that this contract and the sales which were being made under it by petitioner and Nuzum were within the provisions of the Securities Act, and that registration of this stock was required. Indeed, so anxious was petitioner to have this stock registered that it intimated that it might be advisable not to disclose the existence of the option. (Defendant's Exs. 48, 65.)

A. C. Frost, petitioner's President, wrote Nuzum on February 1, 1935, that it was important that the stock be listed on some exchange—"but whichever offers the best advantage for trading purposes". (Plaintiff's Ex. 33, R. 42.) Obviously, petitioner was interested in trading in this stock, and not in holding it as an investment.

The following day, February 2, 1935, Frost again wrote Nuzum concerning the listing of the stock, and said, "If in the application the Company admits that the stock is assessable it will certainly detract from the value of the stock and the marketing of it". (Plaintiff's Ex. 34, R. 43.) Again, it

appears that trading in the stock was petitioner's chief interest.

In plaintiff's Exhibit 35 (R. 43), a letter from Frost to Nuzum, he again speaks about establishing a market for the stock.

The letter from Frost to Nuzum, dated February 6, 1935, (defendant's Ex. 67, R. 90), contemplates the sale of a large block of stock to Gibson & Co., and a sale of 80,000 shares to this concern was made on May 8, 1935. (R. 30, 69, 76, 115, 122.) Petitioner actually consummated this sale itself. (R. 30, 74, 86.)

Plaintiff's Exhibit 37 (R. 44), a letter from A. C. Frost to R. W. Nuzum, dated February 15, 1935, disclosed that petitioner's object under the contract was to market the stock, and not hold it for investment.

Again, by letter dated February 16, 1935, Frost exhibits his impatience concerning the listing of the stock. Also he appears to be pleased about a favorable article appearing in a newspaper. (Plaintiff's Ex. 38, R. 45.) Frost remarks that it will take two or three months to get the stock listed, and then says, "and it will probably consume most of the time we have in which to meet the first $25,000.00 payment on the purchase price of the Mineral Point property". When it is remembered that this option covered almost all of the stock in respondent's treasury (Finding 3, R. 209; R. 110), if this contract were merely a sale by respondent to a single person for an investment, neither petitioner nor respondent would have any interest in listing the stock on an exchange and marketing it. This letter discloses that the stock was to be marketed to raise funds to make respondent's payment under the option on mining claims. The contract was merely a device to accomplish general sales of the stock to the public.

On April 23, 1935, petitioner wrote respondent as follows:

"By reason of *present* market conditions, you may

deal with the treasury stock as you see fit." (Emphasis ours.) (Defendant's Ex. 50, R. 65.)

At the time of trial Frost stated that this letter did not mean what it said and that it was given to facilitate registering the stock with the Securities & Exchange Commission. (R. 65, 86-88 inc.) However, it does show that market conditions were of utmost importance at this time. Nuzum testified that the letter was written because Frost was having difficulty selling the stock. (R. 146.)

Frost wrote a letter to Nuzum dated May 6, 1935, approving the sale of 10,000 shares of this stock. (Defendant's Ex. 66, R. 82.)

On May 11, 1935, petitioner agreed to pay R. W. Nuzum a share of the profits resulting from sales to others, both past and future. (Defendant's Ex. 55, R. 76.) The letter recites that this was in accordance with a proposition made by petitioner "some months ago".

On May 20, 1935, a special meeting of the Board of Directors of petitioner was held and the modification of the contract as set forth in plaintiff's Exhibit 14 was approved, with the following language:

"After a full discussion, the said letter recited in said Resolution was confirmed on the condition and with the understanding that the remaining one million (1,000,000) shares of treasury stock, covered by the option agreement of September 10, 1934, *can be taken up and paid for as and when it is most advantageous to market same* * * *" (Emphasis ours.) (Plaintiff's Ex. 16, R. 22.)

Petitioner was very concerned over the engineers' reports on the mining property, not it appears because he was interested in its values, but because of possible adverse effect on market conditions. (Plaintiff's Exs. 35, 17, 42.)

Plaintiff's Exhibits 28, 29, 43 and 30 disclose the agree-

ment to sell 20,000 shares of the stock to the J. E. Jones Brokerage Corporation. This sale was agreed to by petitioner. (R. 33-37 inc., 69, 86, 116.) Ten cents a share from the purchase price was credited on the option payments, and the balance was given to petitioner, who paid Nuzum a 25 per cent. commission. (R. 33-37 inc.)

Defendant's Exhibit 63 (R. 82) shows that it was contemplated to sell a large block of this stock before it was listed with the Securities & Exchange Commission, to provide funds for respondent to make the payment on the option to purchase the Mineral Point claims.

On July 8, 1935, petitioner sent to Nuzum a certificate representing 5,000 shares of this stock, and requested him to sell it. Petitioner also stated that it desired to sell 25,000 or 30,000 additional shares during that week. (Defendant's Ex. 70, R. 91.) Nuzum replied that it was impossible to sell the stock at that time, and gave as one of the reasons that the stock which petitioner had sold to Gibson & Co. had flooded the market. (Defendant's Ex. 71, R. 92.)

A. C. Frost testified at the trial of this cause that one method of taking up the optioned stock which was followed was to market the stock generally. "The stock was delivered to the prospective—or the purchaser, and credited to our option contract". (R. 27.)

Again, Frost testified that sales of the stock and attempts to sell the stock were "discontinued" after June 29, 1935 (R. 50), thus showing that sales and offerings had been made prior to that time.

D. E. Watson, Secretary of respondent, in identifying plaintiff's Exhibit 74 (R. 95), stated, "Well, it is an account of stock that was sold during the spring of 1935 by R. W. Nuzum and A. C. Frost * * *" (R. 95.) Petitioner's witness E. C. Daniels also testified that a large number of sales were made during this period. (R. 118.)

The evidence pertinent to the question of whether this transaction involved a public offering of this stock has been outlined in considerable detail in order that a comprehensive picture might be presented to the court. The contract as modified by its very terms provides for sales of this stock to the public generally, and for the distribution of the proceeds of such sales. The evidence conclusively shows that both parties contemplated throughout that sales of stock to the public would be offered and made from time to time, and the condition of the market price of this stock was always uppermost in petitioner's mind. Respondent's chief asset was an option to purchase the Mineral Point claims; no payment had been made under this option, and the date of the first payment was approaching. Funds to meet this payment were to be raised by the marketing of the stock by petitioner and Nuzum. This in itself shows that this was no ordinary contract for the sale of stock to a single individual, for if it were, respondent would not benefit by the sale of stock by petitioner, and petitioner would not be anxious to sell the stock to secure funds with which respondent would make its payment.

During the whole time petitioner paid for and received only 165,000 shares of this stock. Yet it and Nuzum sold to the public generally 279,850 shares, and, in addition, petitioner at the same time sold 15,000 shares which it had previously acquired and 140,000 shares belonging to the Bunker Hill Mines Corporation of Toronto, which it had under option. In the face of such an active sales effort on the part of petitioner, it is difficult to understand petitioner's contention that only a single sale of stock to petitioner was involved, that it was purchasing for an investment, and that there was no public offering of the stock.

Petitioner not only actively assisted in the sale to many persons of the 279,850 shares, but received credit of ten

cents a share on its option payments. The balance of the proceeds over and above this ten cents a share amounted to $29,306.00. Petitioner received $13,000.00 of this sum in cash, and the balance was credited to its account to be paid to it out of the earnings of respondent.

Not only has petitioner failed to maintain the burden of establishing that this transaction did not involve a public offering and thus bring it within the exemption of Sec. 4 (1) of the Securities Act, but it conclusively appears that a public offering was specifically provided for by the contract, contemplated throughout by the parties, and effectively consummated in fact. Both the State trial court and the Supreme Court of Idaho so held.

II

A contract made in violation of the Securities Act is void and unenforceable.

The Supreme Court of Idaho held (98 Pac. (2) 965), that as this contract violated the provisions of Sec. 5 of the Securities Act, it is void and unenforceable.

Sec. 5 provides that it is "unlawful" to use the mails or any means or instruments of transportation or communication in interstate commerce to sell or offer to buy an unregistered security, or to deliver the security. Thus, Congress has not only required the registration of securities, but in addition has declared that a violation of the Act is "unlawful".

The Idaho Court in rendering its decision followed the general and well established rule of law that a contract made in violation of statute is void, and the courts are not open to either party to an illegal contract to enforce its wrongful objects.

This court said in Bank of U.S. v. Owens, 2 Pet. 527, 7 L. ed. 508 (1829), in holding unenforceable a contract made in violation of law:

"The answer would seem to be plain and obvious, that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consumation of violations of law?"

"There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal."

This general rule of law has been long and widely applied; and there is no exception where the statute does not specifically declare such contracts void, as appears from the following cases:

Anderson v. Carkins, 135 U.S. 483, 34 L. ed. 272 (1889);

Weil v. Neary, 278 U.S. 160, 73 L. ed. 243 (1928);

Awotin v. Atlas Exchange National Bank, 295 U.S. 209, 79 L. ed. 1393 (1934);

Hannay v. Eve, 3 Cr. 242, 2 L. ed. 427 (1806);

Louisville & N. Ry. Co. v. Mottley, 219 U.S. 467, 55 L. ed. 297 (1910);

Smith v. McCullough, 270, U. S. 456, 70 L. ed. 682 (1925);

Texas & Pac. Ry. Co. v. Pottorff, 291, U. S. 245, 78 L. ed. 777 (1933);

Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903 (1830);

Hall v. Coppell, 7 Wall, 542, 19 L. ed. 244 (1868);

Lingle v. Snyder, 160 Fed. 627 (1908);

McFall v. Arkoosh, 37 Ida. 243, 215 Pac. 978 (1923);

Pacific Elec. Ry. Co. v. Bond & Cas. Ins. Co., 55 Cal. App. 704, 204 Pac. 262 (1921);

Crawford v. McConnell, 173 Okla. 520, 49 Pac. (2) 551 (1935);

Williston on Contracts, Vol. 6, Sec. 1764, n. 70.

The same rule has been applied, and courts have refused

to enforce a contract made in violation of law where the same phraseology is used as is found in the Securities Act, i. e., that certain acts are declared to be "unlawful".

Glass v. Basin & Bay State Mining Co., 31 Mont. 21, 77 Pac. 302 (1904);

Holm v. Bramwell, 20 Cal. App. (2) 332, 67 Pac. (2) 114 (1937).

In addition to prohibiting the acts and transactions prescribed therein, the Securities Act also provides in Sec. 24 that a wilful violation of any of the provisions of the Act is a criminal offense and shall be punished by a fine of not more than $5,000.00, or imprisonment for not more than five years, or both.

A contract made in violation of a criminal statute, or a transaction in furtherance of a criminal enterprise is void and the courts will not give their aid to assist any party thereto. It will leave the parties where it finds them.

Davidson v. Lanier, 4 Wall. 447, 18 L. ed. 377 (1866);

Libby v. Pelham, 30 Ida. 614, 166 Pac. 575 (1917);

Short v. Bullion-Beck & C. Min. Co., 20 Utah, 20, 57 Pac. 720 (1899);

Delgado v. Delgado, 42 N. Mex. 582, 82 Pac. (2) 909 (1938);

Asher v. Johnson, 26 Cal. App. (2) 403, 79 Pac. (2) 457 (1938).

An exception to this general rule of law exists when it affirmatively appears from the language of the statute itself, from the purpose of the act, and from the evil that it is meant to correct, that it was the clear intention of the lawmaking body that a contract made in violation of the statute should, nevertheless, be valid and enforceable.

Cf. Dunlop v. Mercer, 156 Fed. 545 (1907).

It should be emphasized that this is an exception to the general rule. It is not necessary for the court to find that the Legislature intended that all contracts violating a statute are void before so holding. On the contrary, the court shall declare such contracts invalid and unenforceable, unless it shall be satisfied that the Legislature had a clear affirmative intent that such agreements should be valid.

A party claiming under an exception to a general rule of law has the burden of establishing that he clearly comes within such exception.

Spokane & I. E. Ry. Co. v. United States, supra;
Securities & Exchange Commission v. Sunbeam Gold Mines Co., supra.

An examination of the Securities Act as a whole discloses that it was never the intent of Congress that it should fall within the above expressed exception. Rather, it obviously appears that, unless contracts made in violation of the Act and to further enterprises declared unlawful by it are void, the objects of the Act will be defeated.

The purpose of the Act is to protect the public from the sale of worthless securities and from fraudulent and deceitful selling methods. Consequently, registration of the security and approval of the prospectus is required. The chief aim is to protect the purchaser and, therefore, certain specific civil remedies are given a purchaser against a seller who does not comply with the requirements of the statute (Sec. 12). But these remedies are efficacious and the purchaser receives redress only if the seller is financially responsible. In the ordinary case of an issuing corporation, if it is successful the buyer of its securities is not injured and does not complain. It is when such corporation fails that the buyer is harmed, and then of course his only remedy is to exchange his worthless stock for an empty lawsuit without hope of

actual recovery. The same result applies to financially irresponsible underwriters and dealers. Therefore, the maximum protection can be given to the investing public, the only object of the Act, only by declaring void contracts which violate the Act, and by the refusal of the courts to give their aid and sanction to unlawful transactions which disregard the mandatory requirements established by Congress.

McManus v. Fulton, 85 Mont. 170, 278 Pac. 126, 67 A.L.R. 690 (1929);

Brandenburg v. Miley Petroleum Exploration Co., 16 Fed. (2) 933 (1926);

See note 87 A.L.R. 42, at page 98.

Take, for example, the case at bar. Petitioner was obviously in serious financial straits, and respondent had no assets except a couple of options on mining property on which no payments had been made; it was having great difficulty meeting its monthly payroll. To whom could all the purchasers of the 279,850 shares of stock sold by petitioner and respondent look for reimbursement? If contracts such as this one are upheld and approved by the courts, the Securities Act is, for such purchasers, an empty gesture. Then, an issuer can without fear of loss disregard the requirements of registration, make contracts with others to accomplish the sale of its stock to the public generally, and even go so far as to employ deceit and fraud. If the enterprise of the issuer is successful, the purchasers will not object, and, if it is unsuccessful and its assets dissipated, it has nothing it can lose nor that can be recovered by its disgruntled stockholders.

The only certain method of providing adequate protection for the buying public is to check such wilful violations of the Act at their inception. The purpose of the Act is to prevent unregistered securities from being offered to the

public; not merely to give the purchasers an opportunity to recover their losses through the courts — too often a remedy in name only. Such protection can be afforded only by the courts refusing to approve and uphold contracts which violate the statute, particularly when, as in the case at bar, they are obviously designed to, and actually do, accomplish offerings and sales of unregistered issues to the general public. Judicial approval of these unlawful contracts will encourage issuers to disregard the Act, and their failure to comply with its requirements can only result in injury to the public which this Act was designed to protect.

It is urged by petitioner in its brief (p. 17, 19) that registration of securities under the Securities Act is purely voluntary; that Congress did not intend to prohibit the sale in interstate commerce of unregistered securities. However, it should be noticed that Congress incorporated a criminal provision into the law, carrying a harsh penalty. It would be equally absurd to assert that criminal statutes for fraud, larceny, arson, or any other crime do not intend to prohibit such illegal acts—it is merely that if someone violates them they subject themselves to the penalty.

Although petitioner makes no denial of it in its brief, it should be pointed out that both the parties to the contract were in pari delicto. A brief examination of the mass of correspondence, hereinbefore referred to, shows that petitioner realized from the inception that these securities were required to be registered by the Securities Act and that they were not so registered. (See also R. 82-83).

The first cause of action as set forth in petitioner's complaint seeks recovery as damages of its anticipated profits based on that portion of the contract which is wholly unexecuted by either party, and bases its estimate of the damages on the current market price of the stock in June, 1935. Petitioner has neither given up anything nor changed its posi-

tion to its disadvantage in reliance on this illegal contract.

By its second cause of action petitioner is attempting to recover profits from sales of this unregistered stock which it and Nuzum made to the general public. And still petitioner maintains (brief, p. 26) that the Idaho Supreme Court erred in holding that it was selling this stock to the public.

Both of these causes of action are based squarely upon the contract, and petitioner has never asserted otherwise. The contract violates the provisions of the Securities Act of 1933, and is, therefore, void and unenforceable.

CONCLUSION

The judgment of the Supreme Court of Idaho should be affirmed.

Respectfully submitted,

JAMES A. WAYNE,
Wallace, Idaho;
W. H. LANGROISE,
Boise, Idaho,
Counsel for Respondent.

APPENDIX

Pertinent provisions of the Securities Act of 1933, c. 38, Title I, 48 Stat. 74, 77, 87 (15 U.S.C.A. 77a et seq.):

Sec. 2 (15 U.S.C.A. 77b):

"When used in this subchapter, unless the context otherwise requires—

(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

* * *

"(4) The term 'issuer' means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term 'issuer' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal

entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term 'issuer' means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term 'issuer' means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering."

Sec. 4 (15 U.S.C.A. 77d):

"The provision of section 77e (Sec. 5) shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involving in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 77h is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter."

Sec. 5 (15 U.S.C.A. 77e):

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this subchapter, unless such prospectus meets the requirements of section 77j; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 77j."

Sec. 12 (15 U.S.A. 771): Any person who—

(1) sells a security in violation of section 5; or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of

reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Sec. 24 (15 U.S.C.A. 77x):

"Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement or a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

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SUPREME COURT OF THE UNITED

OCTOBER TERM, 1940.

No. 78

A. O. FROST & COMPANY,

Petitioner

vs.

COEUR D'ALENE MINES CORPORATION,

Respondent

Supplemental Brief for Respondent

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Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 78

A. C. FROST & COMPANY,

Petitioner,

vs.

COEUR D'ALENE MINES CORPORATION,

Respondent.

Supplemental Brief for Respondent

The Supreme Court of the State of Idaho, after first deciding that the option contract, which is the sole basis for both of petitioner's causes of action in this case was made in violation of the Securities Act of 1933, ruled that a contract entered into in violation of a statute is unenforceable by either of the parties thereto in the courts of Idaho. (98 Pac. (2d) 965.) Respondent submits that this decision of the State court is a matter of the local common law of the State of Idaho, and presents no Federal question.

Respondent briefly presented this contention in its Brief in Opposition to Petition for Writ of Certiorari (p. 11-13 incl.), but it was not included in the Brief for Respondent.

However, respondent had no intention of abandoning its firm conviction that the refusal of the State court to enforce this illegal contract is based on Idaho common law and thus beyond the scope of inquiry of this court; and, after further consideration, respondent desires to present in more detail to this court its reasons for its opinion.

Throughout this discussion it will be assumed that this option agreement, here under consideration, is in violation of the Securities Act of 1933. (See Brief of Respondent, pp. 6-14 incl.) The State trial court and the Supreme Court, after ruling that the contract violated the Securities Act and was, therefore, unlawful and illegal, then proceeded to hold that the contract is unenforceable in the Idaho courts.

Petitioner, in its Brief (pp. 1-2), asserts that both of these points, vis. (1) that the contract is in contravention of the Securities Act, and (2) that an action on the contract cannot be maintained, raise substantial Federal questions, and attempts to found the jurisdiction of this court on Section 237 (b) of the Judicial Code as amended.[1] We are herewith concerned only with the second point, and respondent earnestly contends that the State Supreme Court's decision that a contract made in violation of a statute cannot be enforced raises no Federal question, and this court has no jurisdiction to review or disturb that ruling.

Petitioner, in its Brief (p. 2), states as follows:

> The Supreme Court of the State of Idaho founded its decision on its interpretion of the Securities Act of 1933, holding that a contract for the sale of stock not registered under the Securities Act of 1933 is void as violative of the spirit or intent of the Act, and that the transaction is not exempted by that Act."

---

[1] §237 (b) Judicial Code as Amended, 28 U. S. C. A. 344 (b): "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified

An examination of the opinion of the State court discloses that the above-quoted statement is erroneous. It is true that the State court, in determining whether or not this contract was in violation of the Securities Act, considered the Act and applied it to the facts in this particular case. But it is not true that the court based its decision that it will not enforce this contract on its interpretation of the Act or because it believed its non-enforcement was required by the spirit or intent of the Act.

The Idaho Supreme Court said (98 Pac. (2d) 965, 968):

> "It should be born in mind that the option agreement is void because prohibited by law. The well established rule is that if the contract is void because prohibited by law or as against public policy the courts will leave the parties in the identical situation in which it finds them,

---

to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

and the contract cannot be treated as valid by invoking estoppel."

Again, the Court said, at page 968:

> "In Libby v. Pelham, 30 Ida. 614, 166 Pac. 575, this court determined that rights based on a violation of law will not be enforced, and if a transaction is illegal because in contravention to a statute, it will not be upheld in any way, but the parties will be left in the situation in which they have voluntarily placed themselves."

Quoting from McManus vs. Fulton, 85 Mont. 170, 278 Pac. 126, 131, 67 A. L. R. 190, the Idaho court said:

> The great weight of authority is that where a party comes into court seeking to enforce a contract which is against public policy or is prohibited by public law, the court will refuse to aid either party and will leave them where they have placed themselves, and in refusing to enforce such contracts the court does not act for the benefit, or for the preservation of the alleged rights, of either party, but in the maintenance of its own dignity, the public good and the laws of the state."

Thus, it decisively appears that the Idaho court held that it will not enforce a contract which is declared unlawful by statute. In so doing it acted within its proper judicial authority by declaring as a matter of state law it will cast down illegal contracts and disregard the pleas of those who are parties to them. The opinion shows that the court did not reach this conclusion as a matter of construction of the Federal statute. It is conceded that the Securities Act does not, in so many words, declare that all contracts made in violation thereof shall be void. Nor did the State court attempt to determine the meaning or intent of Congress in passing the Act. It simply held that it will not demean its dignity by giving judicial sanction to a contract declared by statute to be unlawful (Securities Act of 1933, Sec. 5, see Brief of

Respondent, pp. 22, 23), and a violation of which carries a criminal penalty. (Securities Act of 1933, Sec. 24, see Brief of Respondent, p. 24.)

The Idaho court ruled that the parties to such a contract have no call upon the courts of that state to recognize their unlawful acts or to degrade their powers by giving them redress. This is essentially a matter of the common law of the State of Idaho. No construction of a Federal statute is involved. No application of a Federal statute is invoked nor necessary. It would seem improper and unauthorized for this court now to say to the Idaho court that it does not have the right to declare that it will not enforce unlawful contracts, that it must approve illegality in the face of established doctrine to the contrary.

In holding that an action on an illegal contract cannot be maintained, the State court did not create a new rule of common law in Idaho. It has long been firmly established in the jurisprudence of that State, and, since its original declaration, has been rigidly adhered to.

Libby v. Pelham, 30 Ida. 614, 166 Pac. 575 (1917);
McFall v. Arkoosh, 37 Ida. 243, 215 Pac. 978 (1923);
Deer Creek H. Dist. v. Doumecq H. Dist., 37 Ida. 601, 218 Pac. 371 (1923);
Cf. McConnon v. Holden, 35 Ida. 75, 204 Pac. 656 (1922).

However, it would make no difference if this case were the original promulgation of this doctrine in this State. The Idaho Supreme Court has now ruled in this particular case that under the common law of Idaho this illegal contract is unenforceable. The declaration of the State common law by the highest court of the State is binding on the Federal

courts, and this Court has no jurisdiction to review this decision, whether it is right or wrong.

> Arkansas So. Ry. Co. v. German Nat. Bank, 207 U. S. 270, 51 L. ed. 201 (1907).

Even though it be conceded that a Federal question is presented by the decision of the State court that this contract is not exempted from the provisions of the Securities Act of 1933 because it does not involve a public offering (§4 (1) see Brief of Respondent, p. 22), nevertheless, the question of whether the State court will enforce an illegal contract is one of local State law and presents no Federal question. This court may consider only the Federal question presented in a case, and as to all non-Federal questions it is bound by the decisions of the State court.

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on Federal questions; * *"
>
> Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 680, 74 L. ed. 1107, 1113 (1930).

This court has no jurisdiction nor authority to review questions of local common law.

> Kryger v. Wilson, 242 U. S. 171, 61 L. ed. 229 (1916);
>
> American Ry. Express Co. v. Kentucky, 273 U. S. 269, 71 L. ed. 639 (1927);
>
> Fox Film Corp. v. Muller, 296 U. S. 207, 80 L. ed. 158 (1935).

Section 237 (b) of the Judicial Code, as amended, confers jurisdiction on this court to review decisions of State courts where any title, right, privilege or immunity is specially set up or claimed under a statute of the United States. The only

statute involved in the case at bar is the Securities Act of 1933 and, obviously, it neither expressly nor by inference confers on petitioner any title, right, privilege or immunity under which petitioner could assert that it is entitled to force the State court to enforce its illegal and unlawful contract.

Neither, on the other hand, does respondent assert, nor does the State court hold, that this contract is unenforceable because of any express declarations of the Securities Act, nor any inference that may be drawn therefrom. The Idaho Supreme Court merely asserted its own prerogative, conferred upon it by its sovereign state, in holding that, as a matter of local law and public policy, illegality will not be tolerated, malefactors may not use the courts to accomplish their odious purposes nor to reap the benefits thereof, and the maxims, "Ex dolo malo non oritur actio", and "In pari delicto potior est conditio defendentis", are established as the common law of this State.

This court has no jurisdiction, power, or authority to disturb this decision.

Respectfully submitted,

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Counsel for Respondent.

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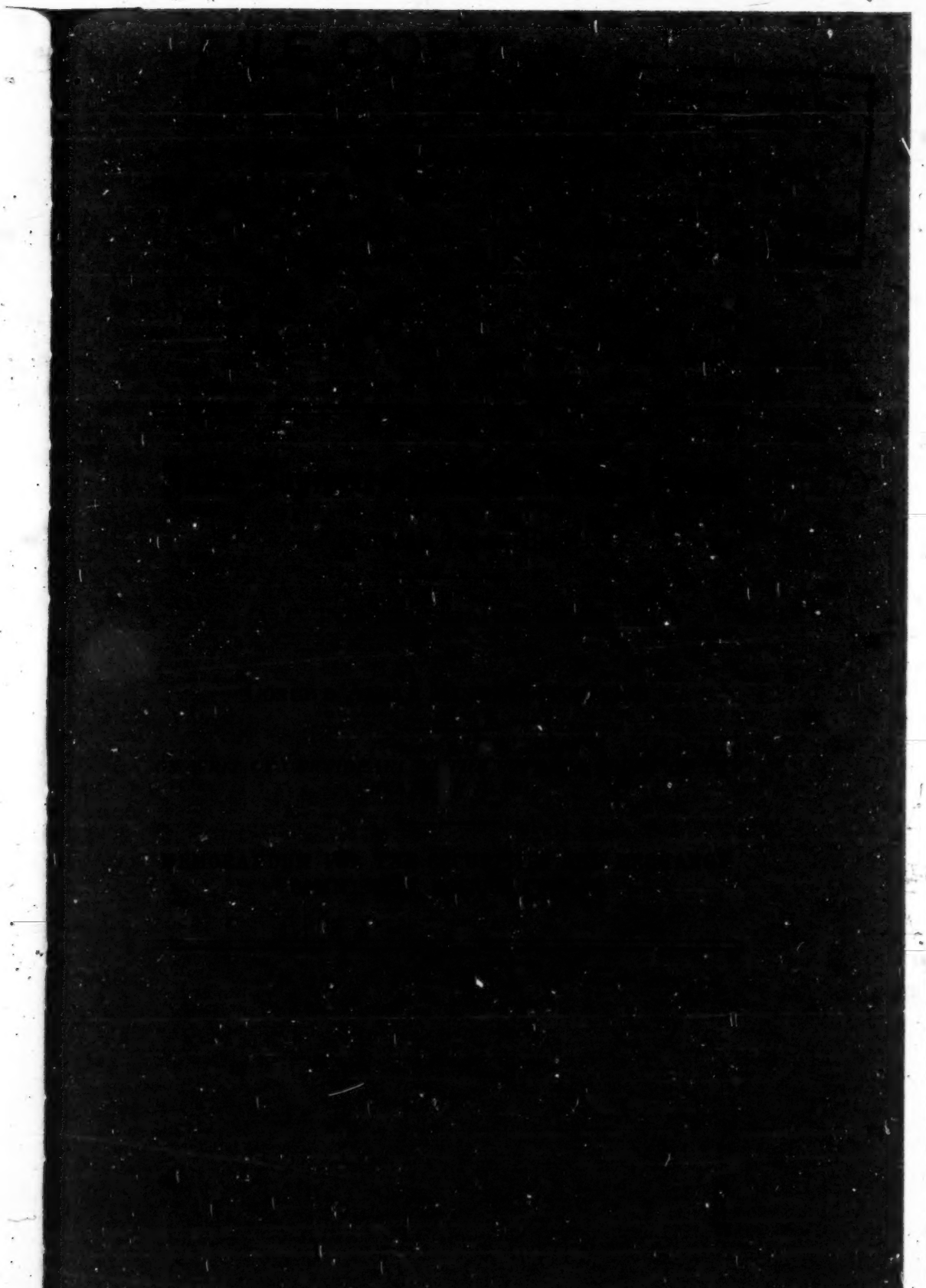

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 78

A. C. FROST & COMPANY, PETITIONER

v.

COEUR D'ALENE MINES CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the District Court of Kootenai County, Idaho (R. 205–219), are not reported. The opinion of the Supreme Court of Idaho (R. 226–235), as modified by the order denying a rehearing (R. 235), is unofficially reported at 98 P. (2d) 965.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on December 15, 1939 (R. 226–227,

234–235). Its order amending its opinion and denying petition for rehearing was entered on February 15, 1940 (R. 235). The petition for certiorari was filed on May 15, 1940, and granted on October 14, 1940. The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

The judgment of the Supreme Court of Idaho (R. 226–227, 234–235) affirmed a judgment for the defendant upon the first cause of action and reversed a judgment for plaintiff upon the second cause of action, with directions to enter judgment for defendant on the second cause of action. The Supreme Court rested its decision upon the determination that "the dealings between Frost & Company and Coeur d'Alene Mines Corporation were in contravention" of Section 77e of the Securities Act of 1933 and that the "option agreement is void because prohibited by law" (R. 228–229, 231–232). Compare *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, 213–214; *Danciger* v. *Cooley*, 248 U. S. 319, 322, 328.

STATUTE INVOLVED

The statute involved is the Securities Act of 1933 (48 Stat. 74, 15 U. S. C., Sec. 77 *et seq.*). The pertinent provisions are set forth, *infra*, in Appendix A.

QUESTIONS PRESENTED

1. Whether, under the circumstances, the sales of treasury stock, pursuant to agreement between

the parties, were by Section 4 (1) exempted from the provisions of Section 5 (a) of the Securities Act of 1933.

2. If not, whether the underwriter who participated with the issuer in making such sales in violation of Section 5 (a) can recover from the issuer (a) damages for the issuer's refusal to deliver all the stock covered by the underwriting agreement, or (b) underwriting profits resulting from sales of the delivered stock.

STATEMENT

The relevant findings of the trial court (R. 205–217) may be summarized as follows:

Petitioner, through its agent, one Boland, entered into a contract dated September 10, 1934 (herein referred to as the option agreement), with respondent whereby respondent agreed to give Boland the "sole and exclusive right and option to purchase the whole or any part" of 1,300,000 shares of treasury stock at the price of ten cents per share, payable in specified installments (R. 209–211). The option agreement, by instrument dated September 10, was assigned by Boland to petitioner, who was thereafter dealt with by respondent as the party to the agreement (R. 211). On April 26, 1935, the agreement was modified to reduce and alter the payments which petitioner was required to make (R. 211–212).

On May 15, 1935, the option agreement was again modified so as to authorize respondent to

sell the shares of stock crediting petitioner with the proceeds over and above ten cents per share (R. 212–213).

Petitioner, in accordance with the option agreement, received 165,000 shares of stock for which it paid $16,500 (R. 213). In addition, petitioner caused to be paid to respondent the option price of ten cents per share for 279,850 shares sold to parties other than petitioner (R. 214). As a result of these latter sales, respondent owed petitioner $16,306, plus interest—a total of $19,132.38 (R. 216–217). During June 1935 respondent refused to deliver to petitioner any more stock, of which at least 805,150 shares were then unsold, on the ground that the stock had not been registered with the Securities and Exchange Commission (R. 215).

The shares of stock covered by the option agreement were never registered for sale under the Securities Act of 1933, or its amendatory acts (R. 215). It appears to be conceded that the stock covered by the option agreement was sold by the use of the mails and means or instruments of transportation and communication in interstate commerce (R. 229).

The trial court held that the option agreement was entered into in violation of the Securities Act of 1933, and its amendatory acts, and was not enforceable as to its unexecuted parts (R. 218). It then gave judgment for respondent on the first

cause of action, for damages for refusal to deliver the stock under the option agreement, and for petitioner on the second cause of action, for the excess above ten cents received on the sales to others (R. 218).

On appeal, the Supreme Court of Idaho affirmed the judgment for respondent on the first cause of action and reversed the judgment for petitioner on the second cause of action, with directions to enter judgment for respondent on the second cause of action (R. 226–227, 234–235).

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Commission is not a party to this case. The Supreme Court of Idaho, however, rested its decision upon an interpretation of certain provisions of the Securities Act of 1933, as amended, the administration of which Congress has conferred upon the Commission. This brief is filed in order to inform the Court as to the views of the Commission on the questions presented insofar as the Securities Act of 1933 may be thought to have a bearing on their determination.

ARGUMENT

A. THE SALES OF THE TREASURY STOCK COVERED BY THE OPTION AGREEMENT WERE NOT, BY SECTION 4 (1) OF THE ACT, EXCEPTED FROM SECTION 5 (A)

The sales of the treasury stock covered by the option agreement concededly violated Section 5 (a)

of the Act unless the original sale to petitioner was covered by the specific exception for "transactions by an issuer not involving a public offering" conferred by Section 4 (1) (see R. 229; Pet. Br. 24–28; Rspt. Br. 7–14). The scope of the exemption given by Section 4 (1) thus becomes a pivotal issue in this case. Its determination, of course, turns not upon the law of Idaho but upon the intention reasonably to be ascribed to Congress. See *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, 213–214; *Danciger* v. *Cooley*, 248 U. S. 319, 322, 328.

The critical words assume their proper content when viewed in their setting in the regulatory scheme. *United States* v. *American Trucking Ass'ns*, 310 U. S. 435, 541–544; *United States* v. *Dickerson*, 310 U. S. 554, 561–562. The basic policy of the Act, in brief, is to protect the investing public by insisting that "every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public." Message of the President to the Congress, March 29, 1933, H. Rep. No. 85, 73d Cong., 1st Sess. p. 1. See also Sen. Rep. No. 47, 73d Cong., 1st Sess. The statutory scheme to accomplish these ends contemplates that a "registration statement" describing the securities and the issuing corporation shall be filed with the Commission and that a "prospectus" summarizing the information contained in

the registration statement shall be furnished to the purchaser in connection with all offers or sales of securities made through the mails or any instrumentality of interstate commerce. Section 5 (a), accordingly, declares generally that it shall be unlawful for any person to sell, offer to buy, or to transport for the purpose of sale or delivery after sale a security by the use of the mails or any instrumentality of interstate commerce, unless a registration statement is in effect as to the security. And Section 5 (b) forbids the transportation for the purpose of sale or delivery after sale of registered securities by the use of such means, unless a copy of the prospectus is given to the purchaser. Sections 11 and 12 create certain civil liabilities and, by implication, permit the purchaser to affirm the sale. Section 24 provides criminal penalties for any person who wilfully violates any provision of the Act. Section 16 states that the "rights and remedies provided by this Title shall be in addition to any and all other rights and remedies that may exist at law or in equity."

The exemption[1] from this scheme of "transactions by an issuer not involving a public offering" was intended to meet a narrow group of cases. Thus the Commerce Committee, in reporting the bill to the House, stated with reference to Section 4 (1): "Again, it exempts transactions by an is-

[1] There are no exemptions or exceptions from Section 17, prohibiting frauds.

suer unless made by or through an underwriter[2] *so as to permit an issuer to make a specific or an isolated sale of its securities* to a particular person, but insisting that if a sale of the issuer's securities should be made generally to the public that that transaction shall come within the purview of the Act." [Italics supplied.] H. Rep. No. 85, 73d Cong., 1st Sess., pp. 15–16.

The Commission, pursuant to its duty to administer the regulatory scheme, has issued two releases setting forth the opinion of its General Counsel as to the proper construction of the exemption in question here. S. E. C. Release Nos. 285 (Jan. 24, 1935) and 603 (Dec. 16, 1935), *infra*, Appendix B. Release No. 285 (Jan. 24, 1935) points out that "all surrounding circumstances are of moment" and that, among other factors, "it would appear to be proper to consider not merely the specific transaction or transactions between the issuer and the initial purchasers, but also the extent to which a later public offering of all or

[2] Section 4 (1) of the original Act exempted: "Transactions by an issuer not with or through an underwriter and not involving any public offering." 48 Stat. 77. It was amended, by the Securities and Exchange Act of 1934, so as to strike out the words "not with or through an underwriter." 48 Stat. 906. The amendment was explained in the Conference Report (H. Rep. No. 1838, 73d Cong., 2d Sess., p. 41): "The Commission has recognized by its interpretations that a public offering is necessary for distribution. Therefore there can be no underwriter within the meaning of the act in the absence of a public offer and the phrase eliminated in the second clause is really superfluous."

part of the securities sold by the issuer is likely." Its supplementary release, No. 603 (Dec. 16, 1935), in answer to an inquiry as to whether a dealer might resell to the public without registration securities initially purchased in connection with a "private offering," states that "the answer to your question depends upon whether the initial purchaser acquired the securities with a view to distribution * * * if his acquisition was with such intent, he would be an underwriter, so that in general sales by dealers of securities bought from him would not be exempt from registration. * * * the intent of the initial purchaser at the time of acquisition is a question of fact * * *." This administrative construction, we submit, is in complete accord with the intent of Congress and should receive approval at the hands of this Court.[3]

Petitioner, while admitting that the issue is "largely a question of fact" (Br. 25), contends

[3] See *Securities and Exchange Commission* v. *Associated Gas & Electric Co.*, 99 F. (2d) 795, 798 (C. C. A. 2d): "Moreover, we are dealing with a new act the administration of which is the peculiar function of the Securities and Exchange Commission. One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field. Its interpretation of the act should control unless plainly erroneous. In no other way can the objects of the act be attained without constant and disconcerting friction." See also *United States* v. *American Trucking Associations*, 310 U. S. 534; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.

that the option agreement did not involve an offer to the public, but merely "an offer to sell all the stock of the corporation remaining in its treasury to but one person, petitioner" (Br. 24). It therefore claims that the subsequent sales to the public were exempt from the registration requirements of the Act (Br. 24–28).

The securities Act of 1933, as indicated above, provides in Section 5 (a) for a general prohibition against sales in interstate commerce without registration. Section 4 (1) excepts certain transactions including, among others, transactions by an issuer not involving any public offering, i. e., purchases not with a view to distribution. S. E. C. Release Nos. 285 and 286, *infra*, Appendix B. If in fact petitioner had purchased the treasury stock for purposes of investment, without any view to a public offering, and had later changed its mind and made a public offering, doubtless, both the sale to it and its subsequent resales to the public would have been exempt from the registration requirements of the Act. But petitioner, claiming the benefit of this exception, must prove its existence.[4]

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[4] Rule 152, *infra*, Appendix C, relied upon by petitioner (Br. 26), has no bearing on this case. The Commission, in promulgating the rule, stated: "The rule makes clear that offerings made prior to the filing of the registration statement and made under circumstances which did not necessitate registration or contemplate registration, do not by the fact of registration become the type of offerings which are

It is established that one claiming the benefit of an exception to a general statutory scheme must sustain the burden of demonstrating its applicability to his case. *Schlemmer* v. *Buffalo, Rochester and Pittsburg Railway Co.*, 205 U. S. 1, 10; *United States* v. *Cook*, 17 Wall. 168; *Commonwealth* v. *Hart*, 11 Cush. (Mass.) 130, 134.[5] Such a burden was imposed on the one claiming an exemption under Section 4 (1) of the Act in the only case raising this issue before a Circuit Court of Appeals. *Securities and Exchange Commission* v. *Sunbeam Gold Mining Co.*, 95 F. (2d) 699, 702 (C. C. A. 9th). The purposes and scheme of the Act, which militate against all but the narrowest scope for this exemption, furnish ample reason for imposing such a burden on petitioner here. Admittedly, however, petitioner has failed to sustain such a burden. Quite to the contrary, petitioner concedes that "the record does not satisfactorily show that petitioner bought the stock purely as an investment" (Pet. Br. 8).

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prohibited by the Securities Act. The rule allows those who have contemplated or begun to undertake a private offering to register the securities without incurring any risk of liability as a consequence of having first contemplated or begun to undertake a private offering." S. E. C. Release No. 305 (March 2, 1935), *infra*, Appendix C.

[5] See also *Grand Trunk Railway Company* v. *United States*, 229 Fed. 116 (C. C. A. 7th), certiorari denied, 241 U. S. 681; *The Algie*, 56 F. (2d) 388 (E. D. N. Y.); *United States* v. *Randell*, 49 F. (2d) 344 (E. D. N. Y.); *Weare* v. *United States*, 1 F. (2d) 617 (C. C. A. 8th).

Accordingly, petitioner cannot successfully contend that the sales of the stock covered by the option agreement were not in violation of Section 5 (a).

The Supreme Court of Idaho might have rested upon the failure of petitioner to prove that the exemption conferred by Section 4 (1) was applicable to its case. Instead, it went further and found affirmatively against petitioner on the facts.* It follows that, unless this Court overturns these findings of fact, there can be no doubt that the sales of the stock covered by the option agreement violated Section 5 (a) of the Act.

B. THE RIGHTS OF THE PARTIES UNDER THE OPTION AGREEMENT AS AFFECTED BY THE SECURITIES ACT OF 1933

There can be no doubt that each of the parties who participated in the sales of the stock covered by the option agreement was equally guilty of vio-

*The Supreme Court of Idaho stated (R. 229): "*The proof* rather than sustaining the burden of showing that the transaction was exempted *affirmatively shows that all the stock offered for sale amounted to public offerings* and that interstate means of communication and transportation were used in connection therewith." Certainly the facts disclosed by the option agreement itself and the so-called subsequent modifications by letter, etc., and the many letters passing between Frost & Company and Coeur d'Alene Mines Company, *recognizing that Frost & Company was selling the treasury stock to all and sundry*, directing delivery of such treasury stock to other stock firms or brokers for sale to or by them flatly refutes such contention as does likewise the case of *Securities and Exchange Commission* v. *Sunbeam Gold Mining Co.*, 95 F. (2d) 699." [Italics supplied.]

lating Section 5 (a) of the Act. It is immaterial that, as between the parties, respondent may have undertaken to register the stock or that, in view of Section 6, only respondent can be regarded as having access to the information required in the registration statement (cf. Pet. Br. 16, 20). Section 5 (a) makes it unlawful for "any person" to make use of the mails or an instrumentality of interstate commerce to sell a security unless a registration statement is in effect as to such security. The duty thus commanded is required of petitioner as well as of respondent.

The Supreme Court of Idaho, moreover, appears to have regarded the option agreement as an integral feature of the sales of treasury stock in violation of the Section 5 (a). Thus, it observed (R. 229) that the "evidence clearly supports the proposition that the dealings between Frost & Company and Coeur d'Alene Mines Corporation were in contravention" of Section 5 (a) and later stated (R. 232) that "It should be borne in mind that the option agreement * * * prohibited by law." Ample support for the view taken by the court can be found in the extensive sales of the optioned stock in violation of the Act, which were effected prior to the breach (see R. 214). There remains for consideration the effect of the illegality—in which both parties actively engaged—upon their rights under the option agreement.

At the threshold of this inquiry there arises the issue whether the rights of the parties as between themselves should be governed by state or by federal law. See *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, 213; *Danciger* v. *Cooley,* 248 U. S. 319, 328; *Sage* v. *Hampe,* 235 U. S. 99. Compare *Board of Commissioners* v. *United States,* 308 U. S. 343; *Deitrick* v. *Greaney,* 309 U. S. 190, 200. It is not entirely clear on this record whether the Idaho Supreme Court in determining the extent and nature of the legal consequences flowing from the unlawful transaction applied concepts derived from local law or from the Securities Act of 1933 and the policy thereby adopted. The decision that the option agreement is void is rested solely upon the fact that it is prohibited by the Securities Act of 1933, presumably because the option was an integral feature of the unlawful sales (R. 231–232). The consequences flowing from this determination appear to be founded on two considerations: recovery on the second cause of action for underwriting profits is barred, at one point, solely because the option agreement is void under the Securities Act (R. 231); at another, recovery on both causes of action is barred in view of the doctrine, whether state or federal is not clear, that parties in "pari delicto" will be left where the courts find them (R. 232–234). But, in any view, since the defense of respondent and the decision on review are both founded ultimately upon the Securities

Act, this Court would appear to have jurisdiction to determine whether the granting of relief on either cause of action would conflict with the Act and the policy which it adopted. *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, 213; *Sage* v. *Hampe,* 235 U. S. 99. Compare *Deitrick* v. *Greaney,* 309 U. S. 190, 200; *Board of Commissioners* v. *United States,* 308 U. S. 343, and cases cited.

The precise issues before this Court are whether—in view of the course of conduct in violation of Section 5 (a) actively engaged in by both the issuer and the underwriter—the underwriter may recover from the issuer (a) damages for failure to deliver additional stock under the option agreement and (b) underwriting profits resulting from sales of the delivered stock. The Commission is of the opinion that the recovery or the denial of recovery on either cause of action would constitute no threat to rights given or guaranteed to investors by the Securities Act of 1933. The Commission, accordingly, expresses no opinion as to whether the precise issues in this case should be determined by state or by federal law. See *Board of Commissioners* v. *United States,* 308 U. S. 343, 352. Nor does the Commission take any position on the question whether, assuming the absence of governing federal policy deriving from the Securities Act, the decision of the Supreme Court of Idaho should be affirmed as resting on an adequate state ground or

should be remanded for clarification. Compare *Minnesota* v. *National Tea Co.*, 309 U. S. 551; *Danciger* v. *Cooley*, 248 U. S. 319, 328.

The Commission has, however, a marked interest in a variant of the situation before this Court. In the more usual case, the securities will have been sold by the underwriter, not by the issuer, and the underwriter will be in possession of the proceeds of the sales. Normally, of course, the issuing corporation would have a valid cause of action against the underwriter for the amount of the proceeds less earned underwriting commissions. But it might be the case, as it is here, that both the issuer and the underwriter had participated in the sales and that the sales had violated Section 5 (a) of the Securities Act. It is important that such violations of the Act should not be made the occasion for judicial decisions which would tend to nullify the purposes of the Act.

The fundamental purpose of the Securities Act of 1933, as we stated under Point A, is to protect the investing public. The Act furnishes one form of protection by insisting that "every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information" to the end that "no essentially important element attending the issue shall be concealed from the buying public." Message of the President to the Congress, March 29, 1933. It is obvious that the purposes of the Act would be defeated by any judicial

doctrine which prevented the issuing corporation from recovering from the underwriter, and putting to the intended use in its business, the money invested by the public in the issuer. And it would be anomalous to rest such an injury to the investors upon the fact that the transaction in which the securities were distributed violated the Act, which was designed to protect those investors. Compare Sections 11 and 12 which, by implication, permit a purchaser to affirm a sale in violation of the Act. It can scarcely be assumed that any court would render such an unfortunate decision. Yet this would be the logical consequence of applying literally the broad language used by the Supreme Court of Idaho in stating the proposition that the courts will not lend their aid to the parties to a contract that is prohibited by law or is against public policy (R. 232–234).

It appears to us to be entirely immaterial whether in such a case, the agreement is labelled "void" or the parties are held to be "in pari delicto." There, labels, as often is the case, merely state the conclusion reached, but do not aid in solution of the problem. The ultimate issue is whether the result in the particular case would effectuate or frustrate the purposes of the Act. See, e. g., *Deitrick* v. *Greaney*, 309 U. S. 190; *Chapman* v. *County of Douglas*, 107 U. S. 348; *Doherty* v. *McAuliffe*, 74 F. (2d) 800, 802 (C. C. A. 1st), certiorari denied, 294 U. S. 730; Gellhorn, *Contracts and Public Pol-*

icy (1935), 35 Columbia Law Review 679.[7] It is our contention that, for the reasons stated, the refusal of recovery in the hypothetical, but more usual, case which we have posed would conflict directly with the Securities Act of 1933 and the policy it adopted.

The Commission also suggests that such a result is not simply a rule to be commended to the state courts but is required under the Securities Act of 1933. The state court when it accepts jurisdiction to settle the rights of the parties to a contract must, of necessity, refer to the governing federal enactments and the policies which Congress has thereby adopted. *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, 213; *Sage* v. *Hampe*, 235 U. S. 99. Surely, it follows that, in determining the consequences which should flow from an illegal course of conduct, the state court must be guided by the policy of the federal act.

Respectfully submitted.

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[7] See also *Williston on Contracts* (Rev. ed.), sec. 1762; *Bowditch* v. *New England Mutual Ins. Co.*, 141 Mass. 292, 4 N. E. 798 (1886); *Kneeland* v. *Emerton*, 280 Mass. 371, 183 N. E. 155 (1932).

APPENDIX A

Provisions of Securities Act of 1933, c. 38, 48 Stat. 74, as amended by the Securities Exchange Act of 1934, c. 404, 48 Stat. 881, 905, Title II.

SEC. 2. [15 U. S. C. § 77b] When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * *

(3) The term "sale," "sell," "offer to sell," or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. * * *

* * * * *

(4) The term "issuer" means every person who issues or proposes to issue any security; * * *

* * * * *

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

* * * * * *

SEC. 4 [15 U. S. C., § 77d]. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; * * *

* * * * * *

SEC. 5 [15 U. S. C., § 77e]. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication

in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.

* * * * * *

SEC. 6. [15 U. S. C., § 77f] (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of

the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States;

* * * * *

SEC. 12. [15 U. S. C. § 771] Any person who—

(1) sells a security in violation of section 5, or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

* * * * *

SEC. 14. [15 U. S. C., § 77n] Any condition, stipulation, or provision binding any

person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

* * * * * *

SEC. 16. [15 U. S. C., § 77p] The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may not exist at law or in equity.

SEC. 17. [15 U. S. C., § 77q] (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale describes such security for a consideration received or to

be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

* * * * * *

SEC. 20 [15 U. S. C., § 77t]. * * *

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may, in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. * * *

* * * * * *

SEC. 24 [15 U. S. C., § 77x]. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

APPENDIX B

For Immediate Release, Thursday, January 24, 1935.

Securities and Exchange Commission
WASHINGTON

Securities Act of 1933.
Release No. 285.

The Securities and Exchange Commission, feeling that the present tendency of large issuers to resort to so-called "private financing" may in many instances be at variance with the law, and that such a tendency is undesirable from the standpoint of thousands of prospective investors who are likely to be deprived of opportunities to participate in sound issues through this device, has today made public the following opinion of its General Counsel, John J. Burns. This opinion concerns the exemption created by the second clause of Section 4 (1) of the Securities Act, which exempts "transactions by an issuer not involving any public offering."

Some misunderstanding has arisen as to the meaning of this provision because correspondents have failed to confine previous opinions of the General Counsel to the exact facts on which the opinions were based. The present opinion indicates the many factors which must be considered in determining the availability of this exemption, and points out that a definite opinion in advance is impossible except in a few clear cases.

The principal factors to be considered are: 1. The number of offerees and their relationship to each other and to the issuer; 2. The number of units offered; 3. The size of the offering; and 4. The manner of offering. Issuers are also warned of the practical difficulty which purchasers would have in redistributing securities originally issued without registration in reliance on this exemption.

The full text of the opinion, which was given in the case of a proposed offering of $1,766,000 of Preferred Stock to 25 offerees, follows:

> The opinion has been previously expressed by this office that an offering of securities to an insubstantial number of persons is a transaction by the issuer not involving any public offering, and hence an exempted transaction under the provisions of Section 4 (1) of the Securities Act. Furthermore, the opinion has been expressed that under ordinary circumstances an offering to not more than approximately twenty-five persons is not an offering to a substantial number and presumably does not involve a public offering.
>
> As a result of such opinions there appears to be developing a general practice on the part of issuers desiring to avoid registration of their securities to seek to dispose of the same to insurance companies or other institutions, which, at the time of purchase, state that they are acquiring such securities for investment and not with a view to distribution.
>
> I would call your attention to the fact that in previous opinions it has been expressly recognized that the determination of what constitutes a public offering is essentially a

question of fact, in which all surrounding circumstances are of moment. In no sense is the question to be determined exclusively by the number of prospective offerees. I conceive that the following factors in particular should be considered in determining whether a public offering is involved in a given transaction:

1. The number of offerees and their relationship to each other and to the issuer.

You will note that this does not mean the number of actual purchasers, but the number of persons to whom the security in question is offered for sale. The word "offering" in this sense should not be limited to those cases wherein a formal proposal for a firm commitment is submitted. Any attempt to dispose of a security should be regarded as an offer. I have very serious doubt as to whether in many of those cases where it is stated that an offering is to be made only to an insubstantial number of persons, there may not be preliminary conversations for the purpose of ascertaining which of various possible purchasers would be willing to accept an offer of the security in question if it were made to them. Any such preliminary negotiations or conversations with a substantial number of prospective purchasers would, in my opinion, cause the offering in question to be a public offering, thereby necessitating prior registration of the security in question.

Again, in determining what constitutes a substantial number of offerees the basis on which the offerees are selected is of the greatest importance. Thus, an offering to a given number of persons chosen from the general public on the ground that they are possible purchasers may be a public offering even though an offering to a larger number of per-

sons who are all the members of a particular class, membership in which may be determined by the application of some pre-existing standard, would be a nonpublic offering. However, I have no doubt but that an offering restricted to a particular group or class may nevertheless be a public offering if it is open to a sufficient number of persons.

I also regard as significant the relationship between the issuer and the offerees. Thus, an offering to the members of a class who should have special knowledge of the issuer is less likely to be a public offering than is an offering to the members of a class of the same size who do not have this advantage. This factor would be particularly important in offerings to employees, where a class of high executive officers would have a special relationship to the issuer which subordinate employees would not enjoy.

2. *The number of units offered.*

If the denominations of the units are such that only an insubstantial number of units is offered, presumably no public offering would be involved. But where many units are offered in small denominations, or are convertible into small denominations, there is some indication that the issuer recognizes the possibility, if not the probability, of a distribution of the security to the public generally. The purpose of the exemption of non-public offerings would appear to have been to make registration unnecessary in these relatively few cases where an issuer desires to consummate a transaction or a few transactions and where the transaction or transactions are of such a nature that the securities in question are not likely to come into the hands of the general public.

In connection with a consideration of the number of units offered, I would also consider whether the same or other securities of the same issuer are being offered at the same time. I feel that this circumstance has a bearing on the character of the offering.

3. *The size of the offering.*

It should be noted that the exemption of Section 4 (1) is of transactions by an issuer *not involving* any public offering. In view of this language, it would appear to be proper to consider not merely the specific transaction or transactions between the issuer and the initial purchasers, but also the extent to which a later public offering of all or part of the securities sold by the issuer is likely. Hence I feel that this exemption was intended to be applied chiefly to small offerings, which in their nature are less likely to be publicly offered even if redistributed.

For the same reason I feel that a material consideration is whether the security in question is part of an issue already dealt in by the public, either on a national securities exchange or on the over-the-counter market, or, within the reasonable contemplation of the parties, is likely thus to be dealt in shortly after its issuance. This factor again may indicate whether public distribution of the security in question is likely within a reasonable time.

4. *The manner of offering.*

I have already indicated my opinion that the purpose of the exemption of nonpublic offerings is largely limited to those cases wherein the issuer desires to consummate a few transactions with particular persons.

Consequently, I feel that transactions which are effected by direct negotiation by the issuer are much more likely to be nonpublic than those effected through the use of the machinery of public distribution.

I have gone into this matter at length in order that you may be apprised of the many elements which in my opinion go into the determination of what constitutes a transaction not involving any public offering. There may be some situations where all the factors are so clear that it would be possible to express a definite opinion. In a situation such as you present, however, I feel that the offering would be carefully scrutinized by any court before which it may come and that any letter which purported to describe the situation, and on which my opinion would necessarily be based, could not, adequately advise as to the various factors which are involved.

I call your attention to the fact that any dealer who might subsequently purchase from an initial purchaser the securities which you propose to offer, would be required to satisfy himself that the initial purchaser had not purchased with a view to distribution. If the initial purchaser had purchased with this intent, he would be an underwriter, and sales by a dealer of securities bought by him from such an initial purchaser would, as a general rule, not be exempt until at least a year after the purchase of the securities by the dealer. The sale of unregistered securities to a limited number of initial purchasers, therefore, leads to a practical situation in which such initial purchasers may have difficulty in disposing of the securities purchased by them. Any opinion which I might render in con-

nection with the proposed offering might, I fear, be availed of by the issuer or by an initial purchaser as a means of satisfying a dealer, at a later date, that he might purchase the securities in question and market them without risk of violating the Act. You will appreciate that my opinion would not actually have this effect, since in the case of each transaction there would be involved various matters of fact on which I am not in a position to express an opinion.

Accordingly, it seems a much wiser policy for me not to express an opinion in the situation which you present as to whether a public offering is involved.

For Immediate Release Monday, December 16, 1935.

Securities and Exchange Commission
Washington

Securities Act of 1933.
Release No. 603 (Class C).

The Securities and Exchange Commission today made public an opinion of its General Counsel, John J. Burns, concerning the application of the registration requirements of the Securities Act of 1933 to the distribution to the public by dealers of unregistered securities which are part of a block originally issued in connection with a so-called "private offering." This opinion supplements the discussion of the problem in Release No. 285, which indicated that the necessity of registration before sales of such securities by dealers would depend upon whether the initial purchasers from whom the dealers had

bought the securities in question had acquired them for investment or with a view to distribution.

The General Counsel's recent letter contains a warning that a mere statement by the initial purchaser at the time of his acquisition that such acquisition was for investment is not conclusive as to his actual intent. The opinion suggests that among the relevant factors which should be considered by a dealer in determining whether he may lawfully participate in the sale of such securities are the relations between the issuer and the initial purchaser, the business of the latter, and the length of time elapsing between such acquisition and resale to the dealer.

The excerpt from the General Counsel's letter, which was in answer to an inquiry whether a dealer might resell to the public without registration a block of securities bought from an initial purchaser who had acquired the securities in connection with a "private offering," is as follows:

> I call your attention to my opinion set out in the next to the last paragraph of Release No. 295, which states in substance, that the answer to your question depends upon whether the initial purchaser acquired the securities with a view to distribution, and further points out that if his acquisition was with such intent, he would be an underwriter, so that in general sales by dealers of securities bought from him would not be exempt from registration.
>
> You will appreciate that the intent of the initial purchaser at the time of acquisition is a question of fact upon which you must satisfy yourself, and upon which I can express no opinion.

I wish to make clear, however, that I do not believe the fact that the initial purchaser has stated that his original purchase was for investment and not for resale is necessarily conclusive on this question. In my opinion there should be considered such other factors as: (1) the relation between the issuer and the initial purchaser; (2) the business of the latter, as for example, whether such purchaser is an underwriter or dealer in securities, and, if not, whether the purchase of such a block of securities for investment is consistent with its general operations; and (3) the length of time elapsing between the acquisition of the securities by the initial purchaser and the date of their proposed resale.

Of course, if the securities in question were in fact purchased by the initial purchaser for investment rather than for resale, dealers' sales thereof to the public would not necessitate registration under the Securities Act.

In conclusion, I feel that I should point out that even though a dealer is satisfied that a particular block of unregistered securities was bought by an initial purchaser for investment, he nevertheless takes the risk that, if his determination is incorrect, sales by him of such securities will be in violation of the registration requirements of the Act.

APPENDIX C

For IMMEDIATE RELEASE Saturday, March 2, 1935.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON

SECURITIES ACT OF 1933.
Release No. 305.

The Securities and Exchange Commission today announced the adoption of the following rule defining transactions not involving any public offering made prior to the filing of a registration statement. The rule makes clear that offerings made prior to the filing of the registration statement and made under circumstances which did not necessitate registration or contemplate registration, do not by the fact of registration become the type of offerings which are prohibited by the Securities Act. The rule allows those who have contemplated or begun to undertake a private offering to register the securities without incurring any risk of liability as a consequence of having first contemplated or begun to undertake a private offering. The rule is as follows:

Regulating defining transactions not involving any public offering made prior to filing of registration statement. The phrase "transactions by an issuer not involving any public offering" as used in Section 4 (1) of the Securities Act of 1933 shall be deemed to apply to transactions not involving any public offering at the time of said transactions, although subsequently thereto the issuer decides to make a public offering and/or files a registration statement.

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SUPREME COURT OF THE UNITED STATES.

No. 78.—October Term, 1940.

A. C. Frost & Company, Petitioner, vs. Coeur D'Alene Mines Corporation. } On Writ of Certiorari to the Supreme Court of the State of Idaho.

[January 20, 1941.]

Mr. Justice McReynolds delivered the opinion of the Court.

September 10, 1934, respondent, by a written contract, gave to one Boland "the sole and exclusive right and option to purchase the whole or any part" of 1,300,000 shares of its treasury stock at 10 cents per share, payments to be made in installments. He immediately assigned the contract to petitioner, Frost & Company. April 26, 1935, this was modified as to time and amount of payments. May 15, 1935, another modification authorized respondent to sell optioned stock and credit petitioner with the proceeds above 10 cents per share.

Petitioner obtained 165,000 shares and paid therefor $16,500. Respondent sold many at prices above 10 cents and gave petitioner credits amounting to $16,306. None of the corporation's shares were registered under the Securities Act of 1933 as amended, c. 38, 48 Stat. 74; c. 404, 48 Stat. 881, 905. And upon that alleged ground, in June 1935, respondent refused delivery of the remaining optioned ones—855,150.

By complaint filed in an Idaho state court, March 26, 1937, petitioner charged that respondent had repudiated the option and asked judgment for $16,306, also damages consequent upon breach of the agreement.

The Answer denied liability upon the ground, among others, that the contract "was entered into in violation of law, and particularly in violation of . . . the Security Act of 1933, approved May 27, 1933, and Acts of Congress amendatory thereof and supplemental thereto, and particularly in this that the 1,300,000 shares of stock attempted to be sold by the defendant to the said W. J. Boland under said instrument was the treasury stock of the defendant corporation, and had never been registered for

sale under said National Securities Act, or Acts amendatory thereof or supplemental thereto, with the Securities and Exchange Commission, and that the said W. J. Boland knew these facts and knew that the defendant could not legally sell to him the said stock or any part thereof; and defendant alleges that said contract was void ab initio."

The cause was tried without a jury. Some evidence tended to show that both parties purposed that petitioner would sell acquired shares to sundry parties through use of the mails and instrumentalities of interstate commerce.

The trial court held the option unenforceable so far as not executed because contrary to law; that petitioner could recover the $16,306 credit; also that there could be no recovery for respondent's failure to deliver.

Upon appeal, the supreme court ruled that, as intended, petitioner sold acquired shares to sundry purchasers, directed deliveries to brokers for resale and "that all stock offered for sale amounted to public offerings and that interstate means of communication and transportation were used in connection therewith". Consequently it declared the agreement void ab initio. Further that the parties must be left in the situation where found. It ordered final judgment for respondent. This action was based wholly on interpretation and application of the Securities Act. Thus a federal question arose which demands determination. *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, 213.

The essential purpose of the statute is to protect investors by requiring publication of certain information concerning securities before offered for sale.

Some of its relevant provisions are in the margin.[1]

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[1] Securities Act of 1933 as amended, 48 Stat. 74, 78, in 1934, 48 Stat. 881, 905-6.

"Sec. 2. [15 U. S. C. § 77b]. When used in this title, unless the context otherwise requires—

"(3) The term 'sale,' 'sell,' 'offer to sell,' or 'offer for sale' shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter, ..."

"Sec. 4 [15 U. S. C., § 77d]. The provisions of section 5 shall not apply to any of the following transactions:

"(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; . . . ."

"Sec. 5 [15 U. S. C., § 77e]. (a) Unless a registration statement is in

Petitioner maintains that the record shows there was no public offering of optioned stock within the meaning of the statute and Section 4(1) is controlling. Considering the interpretation which we adopt it is unnecessary now to pass upon the point. The Supreme Court of Idaho thought the evidence sufficient to show a public offering and, for present purposes only we may accept that view.

No provision of the Act declares that in the absence of registration, contracts in contemplation of or having relation to a

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effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

"(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

"(b) It shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

"(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10."

Section 11 [U. S. C. § 77k] permits security holders to sue specified persons who, in some way, make, permit or use an untrue statement in a registration statement, etc.

"Sec. 12. [15 U. S. C. §771]. Any person who—

"(1) sells a security in violation of section 5, or

"(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments or transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

"Sec. 24 [15 U. S. C., § 77x]. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

public offering shall be void. If there has been no registration, it penalizes the doing of certain designated things—use of the mails, instrumentalities of interstate commerce, etc. It also declares that those who participate in proscribed action shall become liable to purchasers of the securities "who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." These are the sanctions which Congress has definitely provided in order to insure obedience to the statute. When invoked they must be given effect.

Although the challenged contract bears no evidence of criminality and is fair upon its face, we are asked to apply a sanction beyond that specified by declaring it null and void because of relationship to a public offering. The basis for this demand is a supposed federal public policy which requires such anr ment in order to secure observance, effectuate the legislative purpose and prevent noxious consequences.

Courts have often added a sanction to those prescribed for an offense created by statute where the circumstances fairly indicated this would further the essential purpose of the enactment; but we think where the contrary definitely appears—actual hindrance indeed of that purpose—no such addition is permissible. The latter situation is beyond the reason which supports the doctrine now relied upon.

Here the clear legislative purpose was protection of innocent purchasers of securities. They are given definite remedies inconsistent with the idea that every contract having relation to sales of unregistered shares is absolutely void; and to accept the conclusion reached by the Supreme Court below would probably seriously hinder rather than aid the real purpose of the statute.

The Securities & Exchange Commission, by permission, has filed a memorandum pointing out how this purpose may be thwarted and the investing public injured if the ruling below is approved. An excerpt from this is copied below.[2]

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[2] EXCERPT FROM MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION: "The fundamental purpose of the Securities Act of 1933, as we stated under Point A, is to protect the investing public. The Act furnishes one form of protection by insisting that 'every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information' to the end that 'no essentially important element attending the issue shall be con-

The rule that contracts in contravention of public policy are not enforceable came under discussion in *Steele* v. *Drummond,* 275 U. S. 199 and *Twin City Co.* v. *Harding Glass Co.,* 283 U. S. 353, 356, 357. In the latter the opinion declares, the principle "should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. It is only because of the dominant public interest that one who, like respondent, has had the benefit of performance by the other party will be permitted to avoid his own promise."

The protean basis underlying this doctrine has often been stated thus—No one can lawfully do that which tends to injure the public or is detrimental to the public good. If it definitely appears that enforcement of a contract will not be followed by injurious results, generally, at least, what the parties have agreed to ought not to be struck down.

Kimen v. *Atlas Exchange Bank,* 295 U. S. 215 and *Dietrick* v. *Greaney,* 309 U. S. 190, pointed out that whether a contract shall be enforced required consideration of the broad purposes of relevant statutes and the probable effect upon this. In both causes the end which Congress intended to accomplish was treated as the controlling factor.

The Supreme Court of Idaho, we think, misinterpreted and improperly applied the Securities Act. Its judgment must be reversed.

Reversed.

Mr. Justice STONE concurs in the result.

Mr. Justice DOUGLAS took no part in the consideration or decision of this cause.

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cealed from the buying public.' Message of the President to the Congress, March 29, 1933. It is obvious that the purposes of the Act would be defeated by any judicial doctrine which prevented the issuing corporation from recovering from the underwriter, and putting to the intended use in its business, the money invested by the public in the issuer. And it would be anomalous to rest such an injury to the investors upon the fact that the transaction in which the securities were distributed violated the Act, which was designed to protect those investors. Compare Sections 11 and 12 which, by implication, permit a purchaser to affirm a sale in violation of the Act. It can scarcely be assumed that any court would render such an unfortunate decision. Yet this would be the logical consequence of applying literally the broad language used by the Supreme Court of Idaho in stating the proposition that the courts will not lend their aid to the parties to a contract that is prohibited by law or is against public policy.

"It appears to us to be entirely immaterial whether in such a case, the agreement is labelled 'void' or the parties are held to be 'in pari delicto.' There, labels, as often is the case, merely state the conclusion reached, but do not aid in solution of the problem. The ultimate issue is whether the result in the particular case would effectuate or frustrate the purposes of the Act."